LECTURES ON HINDU LAW.

Compiled from Mayne on Hindu Law and Usage, Sarvadhikari's Principles of Hindu Law of Inheritance, Macnaghten's Principles of Hindu and Muhammadan Law, J. S. Siromani's Commentary on Hindu Law, and other books of authority,

AND

Incorporating the latest decisions of the High Courts of Calcutta, Allahabad, Madras and Bombay, and of the Chief Court of the Punjab, up to date, on the subject.

DELIVERED TO THE

LAW CLASSES OF THE PUNJAB UNIVERSITY,

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Lahore:
THE "CAXTON PRINTING WORKS."

1902.

PREFACE.

The object of this book is to state the principles of Hindu Law, as illustrated by the latest judicial decisions.

It is founded on my Notes of Lectures on Hindu Law, delivered as Law Reader to the Students of the Law School (Now Law College) at Lahore. The Notes were compiled from the learned Treatises on Hindu Law by Mayne, Bhattachyra Siromani, Rajkumar Sarbadhicari and other writers on the subject. A translation in Urdu was published in the years 1889 and 1890, and was much appreciated by the Students preparing themselves for the Law Examinations in Urdu, and others interested in the matter.

I have now been encouraged to publish the Notes in English, in the hope that they will prove useful to Students and others preparing themselves for the Law Examinations in Hindu Law.

The Notes have been revised up to date, and the references in the foot notes will, it is hoped, make the book useful to practitioners and the judiciary. The rulings of the several High Courts and the Privy Council, as also the rulings of the Chief Court of the Punjab, have been duly noticed in their proper places.

I have been greatly helped in the preparation of this book by my brother, Lala Beni Parshad, B. A., Pleader, Chief Court, Punjab, Lahore, to whom my best acknowledgments are due.

LAHORE,
October 1*st*, 1902.

CHAPTER I.

Introductory.

CHAPTER II.

The Sources of Hindu Law.

CHAPTER III (OMITTED).

CHAPTER IV.

Family relations, Marriage and Sonship.

CHAPTER V.

Adoption.

CHAPTER VI.

Minority and Guardianship.

CHAPTER VII.

Joint Family.

CHAPTER VIII.

Debts.

CHAPTER IX.

Alienation.

CHAPTER X.

Wills.

CHAPTER XI.

Religious Endowment.

CHAPTER XII.

Benami transactions.

CHAPTER XIII.

Maintenance.

CHAPTER XIV.

PARTITION.

CHAPTER XV.

LAW OF INHERITANCE.

Principles of succession in the case of males.

CHAPTER XVI.

Principles of succession in the case of females.

CHAPTER XVII.

INHERITANCE.

CHAPTER XVIII.

Exclusion from inheritance.

CHAPTER XIX.

Stridhan.

CHAPTER I.

Introductory Remarks.

Importance of Hindu Law.

Indian Law has been, and is being, studied by thousands in India, on account of its practical importance which cannot be rated too highly. But this time-honored system of Law and jurisprudence has another claim for consideration still, which rests on its intrinsic value and interest for every student of the history and literature of the East. It is a mere truism to say that nothing is better capable of illustrating the degree and kind of culture attained by a nation than its laws and usages. The Indian soil has not only been productive in deep thinkers, eminent founders of world-religions, and gifted poets, but it has brought forth a system of law which, after having spread over the whole vast Continent of India, has penetrated at an early period into Burma and Siam and has become the foundation of written law in these two countries. In modern times, after the establishment of British rule in India, the hold of the early native institutions over the Indian mind was found to have remained so firm that it was considered expedient to retain the old national system of inheritance and adoption amidst the most sweeping changes which had been introduced in the administration of the country and in judicial procedure. It was the desire to ascertain the authentic opinions of the early native legislators in regard to these subjects which led to the discovery of Sanskrit literature.

Comparative jurisprudence

Among students of comparative jurisprudence in Europe, the legal history of India is becoming quite a favorite subject. For all researches into the early history of institutions, India is the very country. Moreover in spite of its general archaic character Indian legislation in some respects has early reached a degree of perfection equal or superior to anything to be met with in contemporaneous law-codes of Europe. To illustrate this by an example from that part of the old Indian Law which is still enforced in the Courts. One of the fundamental principles of the Law of Inheritance in Roman Law is the right of representation. Where *e. g.*, the estate of a man descends on his death to his grandsons they do not take it in their own right, but as representatives of their deceased father or fathers, and the amount of each share is regulated according to the number of deceased owner's sons, and not according to the number of his grandsons. This rule, simple and obvious as it appears to us, has been vainly sought for in the old Teutonic Laws, but it is enounced as distinctly as possible in the old metrical Law books of India, and worked out in detail in the Sanskrit Commentaries and Digests. (*a*).

(*a*). Jolly's T. L. L. for 1883, pp. 1—4.

Conception of Law in the Jurisprudence of the Hindus.

The modern or European conception of law is, that it is the wish or command of the sovereign individual or sovereign body; and that, beyond this, *positive law* has no other source or origin. This conception does not obtain in Hindu Law. There is no trace in Hindu Law Literature of the notion that law is a matter of *humam* institution, ordained by *mere human* rulers; that kings have powers of legislation and also powers of abrogating existing laws. On the contrary, there are numerous texts to be found in the writings of the ancient *Rishis* to the effect that law is sacred—that it is of divine origin—that it is the revealed word of God—and that it is eternal and immutable. A passage from the Vedas is translated as below:—

"Law is the king of kings, far more powerful and rigid than they nothing can be mightier than law, by whose aid as by that of the highest monarch, even the weak may prevail over the strong." This is the true conception of law according to the Hindus: it is not a mere fiction to aid the purposes of interpretation, but is an article of belief among them. (*b*).

Legislation no part of the duties of a king.

The king is nowhere required or authorized by Manu to make laws, but on the contrary he is directed to govern his kingdom and to decide the disputes of his subjects according to 'rules drawn from local usages and from written Codes.'

In particular cases which are not comprised in any of the general rules, the law was to be ascertained by the opinion of the well instructed Brahmans which shall he held to be incontestable law: and well instructed Brahmans are declared to be those who can adduce occular proof from the Scripture itself, having studied, as the law ordains, the Vedas and their extended branches which are according to Kulluka Bhatta 'the Vedangas Mimansa, Nyaya, Dharm Sastra, Puranas.' (*c*).

Legislation in consistent with the fundamental notion of Hindu Law.

Again the universally accepted conception that Hindu Law is Revelation, immutable and eternal, cannot consistently be maintained if it is once admitted that there is a power in kings to alter or abrogate those laws, and to substitute other laws in their stead; and the fact is incontrovertible that this law has remained unchanged theoretically as well as practically, from the very earliest times of which we have any historical record. It has remained untouched by any body of *human beings after* the date of its first promulgation. Legislative power, if existing anywhere, would certainly have tampered with its integrity at some period of its immensely long existence. (*d*).

(*b*). and (*c*). T. N. Mitra's T. L. L. for 1879, pp. 3–8.
(*d*). Do. do., p. 10.

The term *Hindu* nowhere occurs in the whole body of original Sanskrit law. The classification of the inhabitants of India, as Hindus and non-Hindus was hardly called by the exigencies of the administration of law, at a time when Brahmanism was the dominant religion of the land. The name appears to be of foreign origin. The Mohammedans coming from the west of the river Sindhu, and from a country far away began to call the people inhabiting the banks of that river as the 'Sindhus'; and as the Persian language generally converts the dental sibilant into an aspirate, the name became changed into 'Hindu.' Gradually as the Mohammedans spread over the rest of India, they observed that there was a general resemblance in the manners and customs and outward appearance of the people inhabiting the country to the east of the Indus; for this reason all the inhabitants of the new country obtained the appellation given to the borderers; and the land became the land of the 'Hindus' in other words, the 'Hindustan.' The word Hindu.

The land of India was never under a really central government before the arrival of the Mohammedans. The tie which connected the different parts was a religious one, and it is probable that this community of religion was indicated in Sanskrit by the two terms 'Arya' and 'Mlecha,' all within the pale of that religion were called Aryas, all beyond were Mlechas. (*e*).

Hindu Law has obligatory force only on those who are by birth as well as religion Hindus. A Hindu who becomes a convert to some other faith, is not deprived *ipso facto* of his rights to property by inheritance or otherwise. *Primâ facie* he loses the benefits of the law of the religion he has abandoned, and acquires a new legal status according to the creed he has embraced, if such creed involves legal responsibilities and obligations. Thus a Hindu adopting the Mohammedan faith, from the moment of his conversion, by that act affects all the property he may subsequently acquire, so as to render it subject to the Mohammedan law of inheritance. His apostacy has an immediate and prospective effect and not a retrospective effect, and his subjection to the new law dates from the profession of the new faith. (*f*). To whom does Hindu Law apply. Effect of change of religion. Change to Mohammedanism.

According to Abraham *vrs.* Abraham (9 M. I. A., 195) a Hindu converted to Christianity may renounce the Hindu Law, or if he thinks fit, he may abide by the old law, notwithstanding that he has renounced the old religion. But Christianity is a religion which can scarcely be said to carry with it or involve any legal rights or obligations. Change to Christianity.

(*e*). Gurudas Bannerji's T. L. L. for 1878, p. 17. See also Bhattacharyya's T. L. L. for 1885, p. 43.
(*f*). I. S. W. R. (P. C.) 1.

The profession of Christianity releases the convert from the trammels of the Hindu Law, but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interests in, and his power over, property.

Test.

The convert though not bound as to such matters, either by the Hindu Law or by any positive law, may, by his *course of conduct* after his conversion, have shown by what law he intended to be governed as to these matters. He may have done so either by attaching himself to a class which as to these matters has adopted and acted upon some particular law, or by having himself observed some family usage or custom. The rights and interests in his property and his power over it would be governed by the law which he has adopted or the rules which he has observed.*

Hindu Law a personal not a local law.

A Hindu migrating from one native territory to another and even when leaving from one district to another, within the limits of the British territories is presumed to carry with him, as a personal law applicable to his family and his possessions, the rules of the *Shastars* under which he has lived up to the time of his migration. He must be presumed, until the contrary is shown, to have brought with him and retained all his religious ceremonies and customs, and consequently the law of succession and of property which is associated with him. But the principle has been definitely affirmed by the Privy Council that a Hindu may, if he chooses, change the *Shastar* or school of law by which he wishes to be governed. The real test to be applied is by what *Shastars* the customs and rites of marriages and funerals are conducted; occasional or daily religious services may be changed without effecting a corresponding charge in a Hindu's legal liabilities. *(g)*.

Effect of conversion from one sect of Hinduism to another.

The adoption of the tenets of another sect of Hinduism will not necessarily affect the laws and customs by which the personal rights and status of the family were originally governed. In a recent case in I. L. R. XVII, Calcutta, page 518, Manik Chand Golecha *vrs.* Jaggat Settani Pran Kumari Bibi, the learned Judges of the Calcutta High Court (Mitter and Beverley J.J. remarked :—

"We think it is satisfactorily proved upon the evidence that the family of Jaggat Seth Gobind Chand originally belonged to the Jain sect of Hindus and that they embraced Vaishnavism in the time of Harek Chand about the beginning of the present century. But we are clearly of opinion that the adoption of the tenets of another sect of Hinduism

(g). Ranee Padmawatee *vrs.* Deolar Singh, 7 S. W. R., 41. see 4 M. I. A., p, 529, and Rutcheputty *v.* Rajander, 11 M. I. A., p. 132.

* The rule is otherwise after the passing of Act X of 1865 - See Secs. 2 and 331 and I. L. R. XIX Bom., 783.

would not affect the laws and customs by which the personal rights and status of the members of the family were governed. The custom in question is not shown to have been in its origin in any way connected with the peculiar tenets of the Jain religion; and in our opinion it would not be affected by the particular creed or religion which a family or an individual governed by it may profess to follow. Moreover in the present case the oral evidence clearly shows that the custom in question prevails among members of the Oswal caste, whether they are Jains or Vaishnavas. We are of opinion, therefore, that the fact that the family have turned Vaishnavas in recent times will not affect the question whether they would still be governed by the Customary law, which, in our opinion, is well established on the evidence."

Rule applicable where the family neither Hindu nor Mohammedan.

In a case in I. L. R. IV, All., 343, Raj Bahadur *vrs.* Bishen Dyal, Mr. Justice Straight remarked :—

'To entitle a person to have the Hindu or Mohammedan Law applied to him he must be an orthodox believer in Hindu or Mohammedan religion. The mere circumstance that he calls himself or is called by others a Hindu or Mohammedan as the case may be, is not enough. His only claim to have a special kind of law applied to him is that he follows and observes a particular religion, that of itself creates his law for him. If he fails to establish his religion, his privilege to the application of its law fails also—and he must be relegated to that class of persons whose cases have to be dealt with according to justice, equity and good conscience.'

In the particular case before the Court (Sribastav Kayasths, of Cawnpur) the family not being Hindu or Mohammedan, the rule of decision applicable to the suit was neither Hindu nor Mohammedan Law, but justice, equity and good conscience—that the Hindu Law of inheritance having been always followed in the family, it was justice, equity and good conscience to apply that law to the suit.

According to the view of Mr. Mayne :—

Nature and origin of Hindu Law.

Hindu Law is based upon immemorial customs, which existed prior to, and independent of, Brahmanism. That when the Aryans penetrated into India, they found there a number of usages either the same as or not wholly unlike their own. That they accepted these, with or without modification, rejecting only those which were incapable of being assimilated, such as polyandry, incestuous marriages and the like. That the latter lived on a merely local life, while the former became incorporated among the systems of the ruling races. That

when Brahmanism arose and the Brahman writers turned their attention to law, they at first simply stated the facts as they found them, without attaching to them any religious significance. That the religious element subsequently grew up, and entwined itself with legal conceptions and then distorted them in three ways. *First.*—By attributing a pious purpose to acts of a purely secular nature ; *2ndly,* by clogging those acts with rules and restrictions, suitable to the assumed pious purpose ; *3rdly,* by gradually altering the customs themselves so as to further the special objects of religion or policy favored by Brahmanism. (*h*).

Distinctive features not Brahmanical.

The most distinctive features of the Hindu Law are the undivided family system, the order of succession, and the practice of adoption. In all these cases Brahmanism has had nothing whatever to do with the early history of those branches of the law. They existed independently of Brahmanism or even of Aryanism, and that where the religious element has entered into and remodelled them, the change in this direction has been absolutely modern.

Joint family system.

This is found in every part of the world where men once settled down to agricultural life. As regards the village communities, the Panjab and the adjoining districts are the region in which they flourish in their primitive vigour. This is the tract which the Aryans must have first traversed on entering India. Yet it seems to have been there that Brahmanism most completely failed to take root. The religious element has never entered into the secular law of the Panjabis.

Law of inheritance.

Amongst the Hindus of the Panjab custom not spiritual considerations determine the order of succession. According to Mitakshara consanguinity in the male line and not efficacy for religious worship is the test which determines the order of succession. The principle that the right of inheritance is wholly regulated with reference to the spiritual benefits to be conferred on the deceased proprietor is only true in Bengal. In Bengal the inheritance follows the duty of offering sacrifices. Elsewhere the duty follows the inheritance.

Adoption.

The inhabitants of the Panjab and North-Western Provinces whether Hindu proper, Jains, Jats, Sikhs or even Mohammedans practice adoption without regard to religious rites or the slightest reference to religious purpose. The celebration of name and the perpetuation of lineage as well as support in old age are rather the only and sufficient incentive to adoption. (*i*).

(*h*). Mayne on H. L., para. 5.
(*i*). Do. do., paras. 7—10.

Limited applicability of Sanskrit law.

It would thus appear that races who are Hindu by name, or even Hindu by religion, are not necessarily governed by any of the written treatises on Hindu Law. Their usages may be very similar, but may be based on principles so different as to make the development wholly inapplicable. Possibly all Brahmans may be precluded, by a sort of estoppel, from denying the authority of the Brahmanical writings which are current in their district. But there can be no pretence for any such estoppel with regard to persons who are not only not Brahmans, but not Aryans. Even in the case of Brahmans of Lahore city the Chief Court in P. R. No. 109 of 1888, with reference to the right of a Brahman son to enforce partition in the lifetime of his father against his father's consent, decided, that this particular doctrine of the Mitakshara has either been never popularly known and acted on, or that it has long fallen into disuse and oblivion, and a doctrine of Benares law which is never attended to and followed, can scarcely, under the Punjab Laws Act, be deemed the law of the residents of Lahore. In an enquiry made under a remand order in another case from the Sialkot District (P. R. No. 113 of 1886), it also appeared that no such powers were recognized among the Brahmans of that District.

So also in a case amongst the Khatris of Lahore where the question was as to the personal liability of certain members of the family on a debt due by a firm admittedly ancestral in its origin, but now carried on in the name of only some members of the family, Powell J. remarked :—

" In the Panjab the true Hindu joint family is almost if not quite unknown ; no families really exist with all the connections kept up that the law-books contemplate. The sons go away by mutual understanding, one or two perhaps carry on the father's business ; others start new trade of their own, others enter service ; yet there is no partition, no drawing up of deeds of any kind ; a certain number of ancestral shops, houses or gardens remain, and these are admittedly joint, while in all other respects the family is disrupted. Such cases can be found by hundreds in this province ; it is the usual procedure. It would be impossible to say that in all such cases the family was joint still and that every one was liable for that business which, because it was once carried on by the father, and now is kept up by one or two among the sons, is an ancestral business." It was held that in Panjab the true and perfect joint Hindu family of the Mitakshara rarely exists, and that disruptions of joint families frequently take place without express partitions. (*j*).

(*j*). Rup Chand and Ram Das, Defendants-Appellants, *vrs.* Basanta Mal and Relu Mal, Plaintiffs-Respondents—P.R. No. 102 of 1889.

See also in this connection P. R. No. 20 of 1897, and I. L. R. I, All., p. 688, (P. C.), case of Jains, and I. L. R. XVII, Cal., p. 518.

QUESTIONS :

I.—What is the true conception of law according to Hindus as distinguished from the European notion ?

II.—What is the true nature of the duties of a king according to Hindus ?

III.—What does the term 'Hindu' denote?

IV.—To whom does Hindu Law apply ?

V.—What would be the effect on a Hindu's status by his change of religion ?

VI.—Would there be any difference in that respect if his conversion is to Christianity rather than to Mohammedanism.

If so, why ?

VII.—Is Hindu Law a local or a personal Law ?

VIII.—What would be the effect on a Hindu's status by his migrating from one territory to another ?

IX.—What test would you apply for determining the School of Law by which a Hindu thus migrating is to be governed ?

X.—What would be the effect of a Hindu's conversion from one sect of Hinduism to another ?

XI.—What rule of law would apply to the case of a person who is neither Hindu nor Mohammedan ?

XII.—What is the view of Mr. Mayne as to the basis of Hindu Law ?

XIII.—How according to him has Brahmanism affected the usages current in India before the arrival of the Aryans ?

XIV.—What are the distinctive features of Hindu Law ?

XV.—Are they peculiar to Brahmanism ?

XVI.—Does all the Sanskrit law apply to all Hindus ?

CHAPTER II.

THE SOURCES OF HINDU LAW.

The roots or sources of law according to Manu are four in number :—Revelation, or the uttered thoughts of inspired seers; the institutes of revered sages, handed down by word of mouth from generation to generation; the proved and immemorial "usages" of the people; and that which satisfies our sense of equity, and is acceptable to reason. (Manu Ch. II, 6.)

In other words—

1. Revelation.
2. Commentaries.
3. Usages.
4. Judicial decisions.

Divine will, the origin of law.

Law is two-fold—Divine and Human. It has its origin in divine will and is interpreted by eminent sages of antiquity, whose writings are entitled to the highest esteem. Custom, in course of time, superseded in many instances, in obedience to the law of progress, the written institutes of ancient sages, engraved though they had been on the tablets of memory. But custom to have had the force of law must be viewed by the light of reason, and the sense of equity must guide our judgments.

Revealed law contained in the Vedas.

The Revealed Law of the Hindus is contained in the Vedas; and the Human Law, in the Codes of Manu, Yajnyavalkya, Parasara and other sages. These Codes, or Institutes, are founded, it is believed, on Revelation and derive their authority from Divine Law. If, therefore, it be ever found that the Revealed Law is at variance with the rules laid down in human "Institutes" the latter should be set aside at once and the law of divine origin must assert its supremacy (*a*).

The Vedas.

The Vedas (1) are in theory, the primary source of Hindu Law. They were originally handed down by tradition as appears from their name *Sruti* or audition. The Rishis

(*a*). Tagore Law Lectures for 1880 by Raj Kumar Sarbadhikari, pages 137, 138.

(1). Veda (from the Sanskrit root *vid* to know) means the sum of knowledge; or according to another etymology, the knowledge which contains the evidence of its truth within itself, that is revelation.

who are mentioned as authors are held to be only agents in formulating the inspiration. They are four in number, *viz.*, the Rik, Sam, Yajus and Atharvan.

Sanhitta. Each of the four Vedas consists of two parts—a Sanhitta or collection of Mantras (2) and a portion called Brahmana. The Mantras are the ultimate source of all the sacred knowledge of the Hindus, and are regarded as the holiest of all holy things. The Mantras are to be found in the Sanhittas of the Vedas.

Brahmans. The Brahmans are theological expositions of the Mantras.

Sutra Works. The Vedas do not contain any exposition of law properly so called. The Grihapati or head of the family was given plenary power to settle all disputes in the family according to his own discretion. It is only the principles or germs as they are called that we find in these sacred books. Law properly so called was formulated in the Kalpa Sutras which were part of the Vedangas or treatises supplementary to the Vedas. The Kalpa Sutras are in the Sutra or aphoristic style which helps the memory, and are therefore called Smritis. The idea which the authors tried to impress upon their pupils, is that the Vedas are too voluminous; and that the Sutras contain in a condensed form whatever is in the Vedas. As a matter of fact the Sutra works contained many things that are not dealt with in the Vedas.

Charans. The authors of the Sutra works became the founders of distinct schools called charanas.

Smritis. In later times the study of the Vedas was superseded by Smritis, the former being considered too voluminous and too high. The Smriti is the recollection handed down by the Rishis or sages of antiquity who had revelation present to their memory. The Sruti is divine, the Smriti of human origin. Where the two conflict the latter must give way.

Though the Vedas are held to be the ultimate source of law, yet for practical purposes the Dharam Sutras and Smritis ought to be regarded as the basis of Hindu Jurisprudence. The authors of the Smritis are human beings. But in the opinion of the orthodox, the Rishis knew the Vedas

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(2). The word Mantra is derived from the root *man* to think; so that the word literary means 'thoughts.' These were the inspired 'thoughts' of primeval saints centred upon that divine light which illumines the darkest recesses of the human mind.

(*Vide* T. L. Lectures for 1880 by Sarbadhikari, pages 139-40).

better than any man, in these degenerate days, can. Anyhow the orthodox look upon the Smritis as authoritative as the Vedas.

Important Smritis.

The most important of the Smritis are Manu, Yagnyavalkya and Narada. The sage Brihaspati says :

Manu.

"Manu holds the first rank among legislators, because he has expressed in his Code the whole sense of the Vedas; that no Code is approved which contradicts Manu."

There is a mythical account given of the personality of the author of the Code. It is said that there have been no less than 10 Manus. The sages implore Manu to inform them of the sacred laws, and he after relating his birth from Brahma, and giving an account of the creation of the world, states that he received the Code from Brahma, and communicates it to the sages, and requests Bhrigu to repeat the same. The rest of the work is then admittedly recited not by Manu, but by Bhrigu, one of the ten.

His age.

Various ages have been assigned to Manu. But the fact is that the Code has undergone so many redactions that it is simply impossible to determine the date of the original Manu. There can be no doubt that it is the oldest of metrical Smritis. Yagnyavalkya seems to be later, and Narada still later. (*b*)

The process by which Hindu Law has been modified and developed by the early Brahmin legislators.

We have seen how Hindu Law is based on immemorial usage, and how it has been modifying and supplanting the existing custom. We have now to see, how the Brahmanical writers have been modifying the very law itself which is declared to be of divine origin. The Brahmins professed that their law is derived from the Vedas, that the Vedas are in existence from the beginning of time. Such being the theory it might seem that they could not change the Law. But practically they modified the law from time to time. It is true, they never assembled together to pass new laws or to modify old ones. But what they did, practically amounted to the same thing. When a Pandit became more than ordinarily famous for learning, and his fame attracted large

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(*b*). The account of the Code of Manu in its present form is placed by Sir W. Jones at 1280 B. C., by Sclegel at about 1000 B. C., by Mr. Elphinstone at about 900 B. C. and by Professor M. Williams at about the 5th Century B. C., while Professor Max Muller places it at 200 B. C.

The work of Yagnyavalkya is placed at 100 A. D. and that of Narad at 5th or 6th Century A. D. (Mayne on Hindu Law, §§ 21 to 23.)

numbers of pupils, any book written by him, and recommended for use to his pupils, became the text-book on the subject. If the new book was decidedly a better one than those in use before it, it superseded the old ones. It is in this way that the Mitakshara superseded the works of Bhojadeva, Bishwarup, &c., and in the same way Dayabhaga has superseded the Mitakshara in Bengal. When the art of printing was unknown the Hindu students could not afford to copy all the different authorities on a subject. They therefore confined their attention to one book prescribed by their Guru, and it was thus that this book was used as the only book of reference and study in the country round about. The disputed questions of law also had to be decided on the authority of that book alone. (*c*)

The Commentaries.

The most important of all the Commentaries is that by *Vijnyaneshvara* known as the *Mitakshara*. Its authority is supreme in the city and Province of Benares, and it stands at the head of the works entitled to authority in Sindh and West of India. In Bengal alone it is to a certain extent superseded by the writings of Jimuta Vahana and his followers while in Gujrat the Mayukh is accepted in preference to it in the very few points on which they differ. His age has been fixed by recent research to be the latter part of the 11th Century. (*d*)

The following will show the different schools of Law as spoken of by some writers and the authorities recognised therein.

1. Benares School	1. Mitakshara. 2. Dattak Mimansa.
2. Dravira School. (Set up in the 13th Century by Dewanda Bhatta). (Southern India School).	1. Mitakshara. 2. Smriti Chandrika by Dedanda Bhattta.
3. Mithala School. (Set up by Chandeshwara, 1314 A. C. and Wachaspati Misra 15th Century). (Tirhcot and North Behar School).	1. Mitakshara. 2. Chintamani by Vachaspati. 3. Vivad Ratnakar by Chandeshar Bhatta.
4. Bengal School. (Founded by Jimutvahana and Raghunandan in the 15th Century). 1. Mitakshara.	1. Dayabhaga. 2. Dayatatwa. 3. Dayakram Sangrah. 4. Commentary on Dayabhaga by Srikrishna. 5. Dattak Chandrika by Raghunmani commonly ascribed to Devanda Bhatta
5. Mahrashtra School. (Founded by Nilakantha in the 17th Century A. D.) (Western India School)	1. Mitakshara. 2. Vayavahara Mayukha. 3. Nirnaya Sindhu. 4. Dattak Mimansa of Nanda Pandita.
6. Gujrat School including Ahmednagar. (*e*)	1. Mayukha. 2. Mitakshara.

(*c*.) J. N. Bhattacharya's Hindu Law, p. 3.
(*d*.) Mayne on Hindu Law, § 26.
(*e*.) J. N. Bhattacharya's Hindu Law, p. 49.

But really there are only two schools marked by a vital difference of opinion, *viz*, the Mitakshara and the Dayabhaga. The principal points of difference between the two are :

1. The Bengal school regulates succession on the principle of religious efficacy (and not propinquity) and consequently it rejects the preference of agnates to cognates.

2. It denies the doctrine that property is by birth, and treats the father as the absolute owner who can dispose of the property at his pleasure ; and the son cannot enforce partition as long as the father is alive.

3. It considers the brothers, or other collateral members of the undivided family, as holding their shares in *quasi*-severalty, which can be disposed of by them at their pleasure while still undivided.

4. It recognizes the widow's right in an undivided family to succeed to her husband's share, if he dies without issue, and to enforce a partition on her own account. *(f)*

QUESTIONS.

I.—What are the sources of Hindu Law and into how many classes it is divided ?

II.—What are the Vedas, the Smritis and the Sutra Works ?

III.—What are the important Smritis ?

IV.—What do you know about Manu, his age and his authority as a law giver ?

V.—Describe the process, if any, by which Hindu Law has been modified and developed by the early Hindu Legislators.

VI.—What are the most important Sanskrit Commentaries on Hindu Law ?

VII.—What are the different schools of Hindu Law in India and the important authorities recognized therein ?

VIII.—State the vital points of difference between the Benares and the Bengal schools of Hindu Law.

(f) Mayne on Hindu Law, $ 35.

CHAPTER IV.

Family Relations.

Marriage and Sonship.

Origin of the institution of marriage.

The institution of marriage is unknown in the primitive condition of law. But it is erroneous to suppose that unqualified promiscuity could ever prevail. The natural craving for sexual enjoyment would lead the savage to keep within his power some member of the opposite sex. If the savage is capable of procuring food enough for himself and his consort, then such appropriation is easily accomplished. If any other member of the Society attempts to disturb the possession of the first appropriator, then the latter would have the support of the society collectively. In this way the institution of marriage first originated.

The first appropriation has its origin apparently in force or enticement or purchase. But forcible seizure will lead to breach of the peace and cannot be countenanced by the people even in the most backward state of society. Forcible seizure or fraudulent enticement is possible only for the more powerful and crafty members. The less powerful and crafty cannot effect the necessary appropriation except by purchase; and when once purchase is recognized as a title giving rise to appropriation, society can no longer tolerate forcible seizure. As people get reformed and refined in their manners they disdain the idea of selling their daughters for money and a free-gift of the girl is the custom adopted by the well-to-do and respectable classes, which again is followed by the lower classes. Whenever a girl is given as a free-gift, it is but natural that the parents should also insist upon the donee to treat the girl with respect and to be faithful to her.

Ceremonies.

When the gift is made privately it is possible for the donee to ignore the fact or disavow the original conditions. This may give rise to quarrels and the legislators therefore insist upon the performance of ceremonies as an essential condition in order to give publicity to the occasion. It then becomes an occasion of festivity. Where ceremonies are duly observed, in celebrating a marriage union, then it becomes far stronger than where it is affected privately by force, fraud or purchase. The ceremonies create a deep and lasting impression on the minds of the parties and of their

neighbours. They all naturally come to suppose that the relation, thus solemnly created cannot be severed and inviolable (*a*)

Polyandry.

Among the Non-Aryan races of India, both the former and present existence of polyandry is beyond dispute. It is peculiarly common among the Hill tribes who are probably aboriginal. The Nairs, the Todas, the Tehurs, the Kadans of Madura are instances of these. It is difficult to believe that polyandry in its lowest form as authorizing the union of women with a plurality of husbands could ever have been common among the ancient Hindus. Such a system would necessarily produce a system of kinship through females, such as actually exists amongst the polyandrous tribes of the West Coast of India. The striking feature among the Aryan Hindus is the strictness with which kinship is traced through male. There are a few solitary instances quoted, but they serve merely as exceptions to the rule. The instance of Draupadi is the only definite one quoted in Hindu books—and that also is not approvingly cited. There was sometimes a special indulgence allowed to Rishis, who had passed out of the order of married men, and whose greatness of spiritual merit made it impossible for them to commit sin. (*b*)

Different forms of Marriage.

India is regarded as an epitome of the whole world in respect of its climate, flora and fauna; and it is equally so in ethnology. In the different parts of India are to be found all the different stages of social progress, from that of the highly cultured Brahmin to the savage inhabitants of Assam, Serjuga and the Garo Hills. Indian life thus presents almost every possible form of conjugal relation, from the grossest polyandry verging on promiscuity to the most rational form of monogamy. Such being the case, Hindu lawyers recognize no less than eight different forms of marriage, different from one another in no slight degree. Most of these forms are strongly condemned by the sages. But the legislator, who has to make laws for different societies cannot but take into account the different customs that prevail therein. He must prescribe rules for the guidance of society and he cannot make sudden or violent innovations. The utmost that he can do is to disapprove of those practices which he would abolish altogether if he could do so by legislation. (*c*)

(*a*). J. N. Bhattacharya's H. L., pp. 78, 79.

(*b*). Mayne on H. L., paras. 60, 61.

(*c*). J. N. Bhattacharya's H. L., pp. 79, 80.

There are eight forms of marriage recognized in Shastars.

The approved forms.	The disapproved forms.
1. The Brahma.	5. Asura.
2. Daiva.	6. Gandharva.
3. Arsha.	7. Rakshasha.
4. Prajapatya.	8. Paishacha.

Different forms of marriage.

These forms are founded upon different views of the marriage relation, they belong to different stages of society and their antiquity is in the inverse ratio to the order in which they are mentioned. The last three point to a time when the rights of parents over their daughters were unknown or disregarded, and when men procured for themselves women (they can hardly yet be called wives) by force, fraud or enticement. The connection between the Rakshasa and the Gandharva forms is evidenced by the fact that both were considered lawful for the warrior tribe. The latter is an advance beyond the former in this respect that it assumes a state of society in which friendly intercourse between man and woman was possible and in which the wishes of the woman were consulted.

Asura form.

The Asura form, or marriage by purchase which Sanscrit writers so much condemn was the next in order of antiquity. When it became impossible or inconvenient to obtain wives by robbery or stealth, and when it was still necessary to obtain them from another tribe, the only other mode would be to obtain them by purchase.

Origin of dowry.

The Arsha form which is one of the approved forms appears to be simply the survival from the Asura, the substantial price paid for the girl having dwindled down to a gift of slights or nominal value. Another mode of preserving the symbol of sale while rejecting the reality appears to have been the receipt of a gift of real value, such a chariot and a hundred cows, which was immediately returned to the giver. This was to fulfil the law, as it was called, that is, to go through the ancient formalities of sale. The ultimate compromise, however, appears to have been that the present given by the suitor was received by the parents for the benefit of the bride and became her dowry.

The essential difference between the three remaining forms Brahma, Daiva, Prajapatya and those just described is this, that while on the one hand the girl is voluntarily handed over by her parents, they on the other hand receive no equivalent. All but two the Brahma and Asura are now obsolete. The former among the higher classes and the latter among the Sudras.

The presumption will be against the assertion that a marriage is in a disapproved form, and that it must be proved by those who rely on it for any purpose. (*d*) Presumption as to form.

A female is not regarded in Hindu Law as an active party in marriage. The bride is received in the more approved forms of marriage as the subject of gift by her father or other guardian. The Shastras authorize Swayamvar or selection of husband, by the bride herself, if she has none to give her in marriage. Sometimes the kings accorded the privilege to their favorite daughters. But these are exceptional cases. In actual practice, girls are given in marriage by their guardians before puberty and Swayamvara may be said to be obsolete. (*e*) Guardianship in marriage.

As the marriage of girls takes place while they are yet infants the father or other guardian has to select the bridegroom and also to preside at the ceremony. The order in which the right to guardianship rests is given somewhat differently by different sages." Yajnyavakya says :— Who can give in marriage.

"The father, paternal grandfather, brother, kinsman sakulya, and mother being of sound mind, are the persons to give away a damsel." Yagnyavalkya I, 64.

This order is accepted in the Mitakshara and is the law all over India except Bengal. It has been held in the case of Maharanee Ram Bansi Koonwaree *versus* Maharanee Soobh Koonwaree (VII W. R., 321) that the word 'mother' in the texts does not include step-mother. It was held in that case that, whereas in the instance of *sakulyas* the order of guardianship is not definitely laid down, the Court has the discretion to select a proper person as guardian, and in the exercise of this discretion the Court held that the paternal grandmother of a girl was preferable to her step-mother as her guardian in marriage. According to Raghunandana the leading authority of the Bengal School they are respectively "the father, paternal grandfather, brother, kinsmen, maternal grandfather, maternal uncle, and mother if of sound mind." According to Narad and others the following persons successively select a husband for a girl. "The father, the brother, the paternal grandfather, maternal uncle, kinsmen or relations as far as the 10th degree of affinity in order of proximity, the mother, and lastly, the remotest relations. If none of the persons above enumerated select a husband for her before maturity, the girl may choose one for herself." *(f)*

(*d*)—Mayne on H. L. §§. 76 to 80.
(*e*)—Bhattacharya's H. L., p. 116.
(*f*)—Do. do. and Trevelyan on Minors, p. 240.

In a divided family the right of selecting a husband is with the mother preferably to that of any other of the kinsmen. The father's consent, however, is indispensable (Khushal Chand v. Bai Mani, 11 Bom., 247).

Validity of marriage without consent of guardian.

The want of a guardian's consent (though doubtless it ought to be obtained) would not invalidate a marriage otherwise legally contracted and performed with all the necessary ceremonies, and a father could not set aside the mariage of a girl performed by the mother, without the father's knowledge or consent, provided it was performed in the interests of the minor and without fraud or force. (*g*)

Forfeiture of guardianship.

From the texts which make it incumbent on the father to give his daughter in marrage before maturity, and from the law as to Swayamvara it follows:—

1.—That the power which the father possesses is more of the nature of a duty than a right.

2.—That the father may forfeit the right by failing to discharge the duty in accordance with law.

While the daughter is yet a minor she must submit to the will of the father or other guardian. But neither the father nor any other guardian, can have the right to dispose of her in a manner not warranted by law. (*h*)

Who may be taken in marriage.

"The selection of a person to be married," says Mayne "is governed by two rules:

First.—That they must be chosen outside the family;

Secondly.—That they must be chosen inside the caste." (*i*)

Mixed marriage.

Originally marriages between men of one class and women of a lower, even of a Sudra class, were recognised. (*j*)

(*g*)—Madhoo Soodan Mookerji *v.* Jadab Chander Bannerjee, III W. R 194. Bindraban Chandra Karmokar *v.* Chandra Karmokar, I L. R., XII, Cal. page 140. Venkatcharyulu *v.* Rangacharyulu I. L. R., XIV, Mad., 316.

(*h*)—I. L. R., XIV, Mad., p. 322, and J. N. Bhattacharya's H. L., p. 121.

(*i*)—Mayne on H. L., § 82.

(*j*)— Do. § 84, Manu at Chap. III, v. 12, 13, 16, says: 'For the first marriage of twice-born men wives of equal caste are recommended; but for those who through desire proceed to marry again the following females according to the direct order of castes are most approved. A Sudra woman to be the wife of a Sudra, a Sudra and Vaisya that of a Vaisya, those two and a Kshatriya to be the wives of a Kshatriya, those three and one of his own caste the wives of a Brahmin. The marriage of a Sudra woman with a twice-born is deprecated and entails the consequence of degrading them to the state of Sudras.'

There is no express prohibition in the Shastras as to intermarriages between persons of different classes, but they are now obsolete, probably from the same process of ideas which has split up the whole Hindu community into countless classes which neither eat nor drink with each other. (*k*)

Manu says :—

Prohibited degrees of relationship in marriage.

" For the nuptial and holy union of a twice-born man she is eligible :—

1. Who is not the daughter of one who is of the same *gotra* (*l*) with the bridegroom's father or maternal grandfather.

2. Who is not a Sapinda (*m*) of the bridegroom's father or maternal grandfather." Manu III, 5.

The whole of it applies to the twice-born. The first part does not apply to Sudras. It is a general rule applicable to all castes that the Sapinda relationship ceases after the fifth and seventh degree from the mother and father respectively.

Marriage enjoined as a duty.

Marriage is enjoined as a duty in the Hindu Shastras. It is not a mere civil contract but a *sangskar* or sacrament necessary for complete regeneration, except in the case of a male marrying a second time. (*n*)

Who are competent to marry.

A Hindu marriage is the performance of a religious duty not a contract, therefore the consenting mind is not necessary and its absence whether from infancy or incapacity is immaterial. Idiots and lunatics, though disqualified for civil purposes, are competent to marry.

Eunuchs and impotent persons.

The rules which enjoin marriage are evidently not applicable to eunuchs, the masculine gender being used definitely. Such persons cannot go through the ceremony of marriage; though if a girl is actually given the gift may not be held void. Such persons are not entitled to enforce restitution of conjugal rights. (Bai Prem Bhukar, *v.* Bhikhu Kalianji, 5 B. H. R. 209).

Disqualifications in marriage.

Excepting the disqualifications arising from difference of caste, identity of *gotra*, and relationship within the prohibited degrees, no other disqualification will, it seems, be held by a Court of Justice to be sufficient to invalidate a marriage already completed and otherwise valid. Marriages

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(*k*).—13 M. I. A., p. 141. Mayne on H. L., §. 85.

(*l*).—The word *gotra*, originally meaning an enclosure for kine, has by degrees come to mean a family, or clan, or those descended from the same primitive stock. (T. L. L. on H. L for 1878, p. 58).

(*m*).—Connected by particles of blood or agnate.

(*n*).—J N. Bhattacharya's H. L., p. 80.

of idiot and other naturally disqualified persons though legal are exceedingly improper. They must obviously be of rare occurrence and the rule which declares them valid and legal can be justified only on the ground, that the opposite rule would be hard against the unfortunate offspring, and would deprive the unhappy wife of her legitimate conjugal status without giving her any compensating advantages. *(o)*

Second marriage of women. The second marriage of women was formerly allowed by early writers and there are passages in the Vedas to this effect. It was at one time doubted whether the re-marriage of widows was sanctioned by Manu, and it was held that his authority was on the other way. The only exception which he appears to allow is in the case of a girl whose husband has died before consummation, who may be married again to the brother of the deceased bridegroom. But it has now been shown that this was the result of interpolation. Narad who had an earlier text of Manu before him lays down that " there are five cases in which a woman may take another husband, her first husband having perished, or died naturally, or gone abroad, or if he be impotent or have lost his caste. (*p*)

Re-marriage of Hindu widow is now sanctioned by Act XV of 1856. A Hindu widow on re-marriage forfeits the estate inherited from her former husband. *(q)*

Saptpadi. When once a marriage is complete, that is, when the essential part of the ceremony, the taking of the last of the seven steps is over it becomes irrevocable, though such a result will not follow from a mere betrothal which is always revocable. It is now settled by decision that a contract to marry will not be specifically enforced, and that the only remedy is by an action for damages when all expenses resulting from the abortive contract may be recovered. (*r*)

Conjugal rights not alterable by contract. The legal consequences which flow from marriage cannot be avoided or modified by contract. The High Court of Bengal in a case where the parties had agreed that the marriage relation shall be void on the husband ceasing to live in the wife's paternal village, laid down :—

(*o*)—Dabee Charn Mitter *v.* Radha Charn Mitra, 2 Mor., 99. *Note* :—According to Manu a man who marries before 24 years or before the completion of his scholastic period incurs a sin (Manu IX., 94). But this scholastic period is only now a form gone through after investiture—J. N. Bhattacharya's H. L., pp. 82 and 83.

(*p*)—See Mayne on H. L.. § 88.

(*q*)—Section 2. Act XV of 1856. As to the effect of the Act where a second marriage is permitted by custom in her caste. See notes under Sec. 32, Rattigan's Digest of Customary Law and I. L. R., XIA. 330—Compare however, I. L. R., XXII.C. 589.

(r)—See Mayne on H. L., § 90.

"It is contrary to the policy of the Law to allow persons by a contract between themselves to avoid a marriage on the happening of any event they think fit to fix upon." (*s*)

Rights of husband and wife on each other's person.

Parties may desert each other under certain circumstances, but the relationship is never dissolved. It lasts even after death. The *Pindas* offered to them by their sons, grandsons, &c., are supposed to be eaten together by the parents. The conversion of a Hindu wife or husband does not *ipso facto* dissolve a previous marriage, nor will mere repudiation have that effect. (*t*)

Divorce.

Divorce among Hindus is not allowed by the Hindu Law, though divorce with the consent of the husband, and the re-marriage of a divorced wife are in some cases, in inferior classes only, permitted by custom. The husband in such cases generally grants to the wife a *chhor chithee* or letter of release. Though divorce is not permitted the parties are not always compellable to live together; and either spouse is permitted to resist the claim of the other for restitution of conjugal rights. This separation between husband and wife, commonly known as *desertion,* is not a divorce, as it has not the effect of dissolving the marriage tie completely so long as both the parties are Hindus: and this also differs from supersession of a wife, for a wife, superseded by another, does not lose her claim for restitution of conjugal rights, nor indeed any of her rights as wife. A wife may be *superseded* for no cause shown, but she can be *deserted* for conjugal infidelity, or if she is disobedient, or self-willed, or commits a sin, involving degradation, or changes her religion, or if she is related within the prohibited degrees, or if she belongs to the same *Gotra*; and the only grounds which justify the desertion of the husband are his degradation and loss of caste, cruelty of the husband, and his labouring under loathsome and contagious disease, and change of religion. (*u*)

Consummation how far necessary to complete marriage.

It is upon the principle of marriage being a sacrament and indissoluble that the Hindu Law prescribes that when it is once completed by the performance of certain ceremonies, it becomes irrevocable although consummation may not have taken place. In Panjab the "Abstract Principle of Law"

(*s*) Sita Ram *vrs.* Ahiri Harini, 20 W. R., 49, Manu IX, 46.

(*t*) See The Govt. of Bombay *v.* Ganga, I. L. R., IV Bom., 330, and *in re* Millard and another, I. L. R., X Mad. 11. Administrator General *v.* Anand Chari, IX, Mad., 466.

(*u*) Narasimmiah and Samarao's Principles of H. L., p. 27.

which was in force before Act IV of 1872 contained a clause to the effect: "that if the marriage shall have been solemnized during the infancy of the parties and shall not have been actually consummated, and if in such case either of the parties on coming of age may refuse to acknowledge the marriage or may contract another marriage, then an action for damages will lie against both the child who violates the contract, and the parent who made it," and so long as the book was recognized in the province the principle therein adverted to was acted upon by the Courts. Thus in Jivan *versus* Sondhi, P. R., 1870, Civil Ruling No. 3, where the marriage had taken place when the girl was 7 years old, and there was no reliable evidence of consummation, the Chief Court refused to decree custody of the girl to the husband and ruled that he was only entitled to damages. So also in an earlier case it was held that a marriage, until it is consummated, is voidable and incomplete, and that neither the woman nor the person whom she subsequently marries, is punishable for bigamy or for abetment of the same. (P. R. 48 of 1867, Cr.) But since the introduction of Act IV of 1872 the work entitled "Abstract Principle of Law" has ceased to be recognized as possessing any legal authority and it has accordingly been lately ruled that consummation is no longer necessary to make a marriage legally complete. (Biswas *versus* Lawan, P. R. 9 of 1874, Cr. Ruling). This point was recently discussed in the now well-known case of Rukmabai of Bombay. (I. L. R. X, Bombay, 301.) The facts were: Plaintiff, Dadaji Bhikaji, a Hindu aged 19, was married by one of the approved forms of marriage to Rukmabai then of the age of 11 years, with the consent of her guardians. After the marriage, the girl lived at the house of her step-father where plaintiff visited her from time to time. The marriage was not consummated. Eleven years after the marriage *viz.*, in 1884, the husband called upon the wife to go to his house and live with him, and she refused. He thereupon brought a suit praying for restitution of conjugal rights and that the defendant might be ordered to take up her residence with him. After an elaborate discussion of the authorities the Court decreed restitution of conjugal rights.

Consequences relating to the person of the parties to marriage.

The custom of the country generally is that minor girls live with their parents, but, as soon as they reach their maturity, the husband is entitled to the custody of his wife,

and the Civil Courts will support his right by a "decree for restitution of conjugal rights" and enforce the decree by imprisonment of the defendant under Section 260 of the Civil Procedure. (*v*)

Act XXI of 1866.

But a party who has renounced Hinduism is not entitled to enforce such a claim against a husband or wife who remains a Hindu; and Act XXI of 1850 does not seem to affect such a question. Act XXI of 1866 enacts that if, after one party becomes a Christian, the other refuses to cohabit with the convert, on the ground of change of religion, the marriage is declared dissolved.

Defence to suits for restitution of conjugal rights.

A suit for restitution of conjugal rights could only be effectually met by establishing a plea of some matrimonial offence on the part of the plaintiff such as would entitle the defendant to a separation. Legal cruelty on the part of the plaintiff may be a ground for refusing restitution of conjugal rights or for imposing terms on the plaintiff. The provisions of Articles 34 and 35 of the second schedule of the Limitation Act cannot be taken as applicable to suits for the restitution of conjugal rights, or for the recovery of a wife. (*w*)

Secondary sons how discarded.

All the secondary sons, with the exception of the Dattaka, have not only become obsolete, but according to the Shastras, they are not sons at all in the present age. Vrihaspati says :—

"Sons of many descriptions, who were made by ancient saints, cannot now be adopted by men, by reason of their deficiency of power." Vrihaspati XXIV, 14.

Then again the Aditya Puran says :—

"The recognition as son, of any other than the legitimate and the Dattaka, intermarriage between different castes, &c., these were prohibited by the great and the learned in the beginning of the Kali age—for preservation of society. The rules laid down by the wise are as binding as those prescribed by the Vedas." (*x*)

(*v*).—Santosh Ram *v.* Gera Pattuck, 23 W. R. 22, and Kateeram *v.* Mussammat Gendhere *ib.* p. 178.

(*w*).—Narasimmiah and Samaraos, Principles of H. L., pp. 17 and 18 and Mahmud J. in Binda *v.* Kaunsilia I. L. R., XIII, All., p. 126.

(*x*).—J. N. Bhattacharya's H. L., p. 142.

QUESTIONS.

1.—How do you account for the early institution of marriage amongst mankind?

2.—What are the forms of marriage recognized in Hindu Law?

3.—How do you account for their existence in India?

4.—Did they form part of the Aryan system of laws?

5.—What was the position of Hindu Legislators with respect to these forms of marriage?

6.—Give a short description of these forms?

7.—(*b*) What forms are now current and how have the rest been discarded?

7.—What is the general presumption of Hindu Law with regard to a marriage having been performed in an approved or a disapproved form?

8.—Who may give the girl in marriage?

9.—Who is a proper person for being taken in marriage?

10.—What does the term *Gotra* indicate?

11.—Who are competent to marry?

12.—What is the nature of a marriage relation according to Hindu Law and how does it differ from other systems of Law?

13.—Is marriage a necessity for a Hindu? If so, why?

14.—Is the second marriage of widows sanctioned by early Hindu Law? What is the present law on the subject? Give authorities.

15.—Is consummation necessary to complete a marriage between Hindus?

16.—What is the effect of recent rulings on the subject?

17.—What is the law as to divorce amongst or deserted Hindus?

18.—What is the effect of marriage on each other's person?

19.—What would be a valid defence to a suit for restitution of conjugal rights amongst Hindus?

20.—How have the different sorts of secondary sons been discarded by Hindu sages?

CHAPTER V.

Adoption.

Early notions about adoption.

In early times society was an aggregation of families rather than of individuals. The idea that a number of persons should exercise political rights in common simply because they happened to live within the same topographical limits, was utterly strange and monstrous to primitive antiquity. The expedient which in those times commended favour was that the incoming population should *feign themselves* to be descended from the same stock as the people on whom they were engrafted. The men who formed the various political groups would meet together periodically for the purpose of acknowledging and consecrating their association by common sacrifices. Strangers amalgamated with the brotherhood were admitted to these sacrifices, and when that was once done we can believe that it seemed equally easy or not more difficult, to conceive them as sharing in the common lineage. The conclusion, then, according to Sir Henry Mayne, which is suggested by the evidence is, not that all early societies were formed by descent from the same ancestor, but that all of them which had any permanence or solidity either were so descended or assumed that they were. (*a*)

Object of adoption.

We find this system of affiliation by means of adoption in all the ancient societies, and the rules obtaining on the subject in different societies have a close resemblance to each other. The rules of the Greek and Romans agree in many particulars with those laid down by Hindu Law. According to these adoption was made not for the sole purpose of continuing the line of descent but, what was more, for the religious motive of keeping up the family rites intact. The text from Vriddha satatapa commonly ascribed to Manu lays down.—

'A son of any description must be anxiously adopted by a man destitute of male issue for the sake of funeral cake, water and solemn rite and for perpetuating his name, *i. e.*, his lineage.' The objects therefore are four-fold :—(1) Performance of funeral ceremonies. (2) Performance of Shradh. (3). Performance of tarpan or the giving of libations of water. (4). Perpetuation of lineage. The author of the Chandrika has shown that the perpetuation of

(*a*) Ancient Law by Sir H. S. Mayne, p. 131.

lineage is the main object. For a man who has a brother's son may yet adopt a son, though he does not stand in need of a secondary son for any spiritual purpose. A brother's son confers all that spiritual benefit which a man's own son does. But perpetuation of lineage is not effected by a nephew as such, and a man having a nephew can yet adopt a son for the last mentioned object. (*b*)

Adoption in the Panjab.

The anxiety to transmit one's name and fortune to a male representative or heir is natural to man in every condition of society but more especially so amongst agricultural communities where it is all important that the cultivation of the land should be entrusted to one who is physically capable of looking after it. Thus in the days of Sikh rule in the Panjab, an old village proprietor who had no male issue of his own, when he found his end approaching, would select from amongst his clansmen some promising young man and make him his heir. There was no ceremony needed beyond perhaps assembling the brotherhood and giving publicity to the nomination of the heir. Nor was the religious notion of a mystical second birth at all imported into the transaction, which was more in the nature of a testamentary devise than an act of affiliation, to which the term 'adoption' was applied in systems of law like the Greek, Roman and Hindu. In those systems adoption served a two-fold purpose. It not only supplied a means of creating an heir by simulating birth, but it also served the no less important end of preserving unbroken the *sacra* or family rites of the deceased, on the due celebration of which depended the protection of the gods and the salvation of the souls of departed ancestors. It was this connection with religion which caused adoption in most ancient systems to be clothed with a complex ceremonial ritual, the exact observance of which was deemed essential to the validity of the act. (c).

Who can adopt a son.

A man who never had a son as well as one whose son is dead may adopt. The word 'sonless' in the text means one who has no son, grandson or great-grandson, for one having a grandson or great-grandson is not in need of an adopted son, either for spiricial or for temporal purposes. A man having

(*b*) History of Hindu Law by J. Jolly (T. L. L. for 1883) p. 300. and Commentaries on Hindu Law by Jogendra Nath Bhattacharya, pp. 143, 144.

(*c*). Notes on Customary Law by Bulnois and Rattigan, p. 128.

a brother's son, also a man who has a daughter's son can yet adopt himself, though for spiritual purposes the adoption may not be necessary. (*d*).

Double adoptions.

A man having one adopted son living cannot take another in adoption. The power to adopt rests solely upon the religious necessities, so to speak, of the father, and is limited by them. It does not enable him to do more than is at the time of exercising it, reasonably sufficient to satisfy the purpose for which the law exists. Consequently supposing the occasion for exercising the power to have risen, one son and one alone can be adopted. The adoption of two is not within the scope of the power and where such a thing is attempted neither of the children is the legally adopted son, although the ceremonies may have been performed as regards each and also at the same time. (*e*). So also there can be no simultaneous adoption by the several wives of the same man of two or more sons to one father. (*f*).

Adoption by minor.

A minor can accept a gift and utter Vedic mantras, and can therefore take a child in adoption, if he he has arrived at the age of discretion. (*g*). A lad of 15 years is considered to have attained discretion. (*h*).

Adoption by unmarried persons.

One who has never married or whose wife is dead may adopt a son. (*i*).

Adoption by disqualified persons.

Adopted sons of those who are excluded from inheritance on account of mental or bodily disqualification, are not entitled to inherit as heir. It is not therefore of much practical importance whether a disqualified person can take a child in adoption.

Adoption by females.

A female cannot adopt a son to her husband during his lifetime, except with his assent. Her capacity to adopt to him, after his death, whether with or without his

(*d*) Woomu Daee, Plaintiff *v.* Gokal Chand Das, Defendant, (I. L R. 3 Cal., p. 587) (P. C.)

(*e*) *Vide* remarks of Phear, J., in IX, Cal., p. 52.

(*f*) Surendra Keshab Roy *versus* Doorga Soondery (I. L. R., XIX C, 513.)

(*g*) Rajindra Narayan Lahoree *v.* Saroda Sundaree Dabee (S. W. R. XV. p. 548.)

(*h*) I. L. R. I. Cal. 289, (P. C).

(*i*) Nagapa v. Suba Sastri 2 M. H. 367, Gopal Anant v. Narayan Ganesh, I. L. R., 12 Bom. 329, I. L. R., 12 A., p. 352. But opinions on this point differ, *see* J. N. Bhattacharya's Hindu Law, 2nd Edition p. 148.

assent, is a point which has given rise to four different opinions, each of which is settled to be law in the Province where it prevails. All the schools accept as authoritative the text of Vasishta, which says.—"Nor let a woman give or accept a son unless with the assent of her lord." But the *Mithila* School apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and, therefore, that a widow cannot receive a son in adoption according to the Dattak form, at all. The *Bengal* School interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death, whilst the Mayukha, Kausthamba and other treatises which govern the *Mahratta* School explain the text away by saying, that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. In Southern India the want of her husband's assent may be supplied by that of his Sapindas. The Benares law is the same as that of Bengal. The result is that in case of an adoption by a widow, in Mithila no consent is sufficient; in Western India no consent is required; in Bengal and Benares the husband's assent is required; in Southern India the consent either of the husband or of the Sapindas is sufficient. (*j*)

Adoption by a widow in the Panjab.

In Panjab a widow cannot adopt an heir to her husband unless she has been expressly authorized to do so, or has obtained the consent of her husband's kindred. (*k*)

Adoption among Jains.

A widow of the Oswal Jain sect can adopt a son without the express or implied authority of the husband, even though the family may have become Vaishnavas (*l*).

Nature of adoption by a widow.

In interpreting the texts of Manu and Atri, the author of the Chandrika says, that although the word 'sonless' is used in the masculine gender, it ought to be taken to include also females having no son, in order to make it harmonize with the text of Vasishta, according to which a female can adopt with the permission of her husband. The result evidently is that a female adopts in her own right, just as a male, there being this difference, that a female cannot adopt

(*j*) Mayne on H. L. 101.

(*k*) *See* Rattigan's Digest of Customary Law, para 39.

(*l*) Manack Chand Golecha *v.* Jaggat Sethani, I. L. R. 17 C. 518, Kapur Chand *v.* Niranjan Lal, P. R. 20 of 1897.

without the consent of her husband. When a widow takes a child in adoption she acts neither as an agent nor as the surviving half of her husband. Considering the nature of the ceremony it is very doubtful whether adoption can be made through an agent. Although the widow is regarded as the surviving half of her husband, yet that is true only in a secondary sense. At all events, she cannot be constituted as an agent for the performance of all acts prescribed by the Vedas. It is difficult how a deceased can take a child in adoption through an agent, for agency is terminated by death. (*m*).

Customary adoption as distinguished from ceremonial adoption.

Analogics are often misleading, and the circumstance that the heir appointed by a childless proprietor to succeed him is in a manner thenceforward so far separated from his natural family as ordinarily to lose his original share of inheritance, has induced many persons to regard this appointment as tantamount to an adoption. But this exclusion from a share in the estate of the natural family is not due to the notion of the complete change of paternity, as in the case of adoption properly so called, but rather to an equitable rule of division of property, according to which the benefit of securing a share in the new family is set off against the loss of a share in the ancestral estate, which is reserved for those on whom the labour and expense of its management devolve. Thus if the exclusion were due to the mere change of paternity, the child would still be debarred from the inheritance even if the natural father died without heirs, but it is believed that in such a case village custom would be in favor of the child's double succession. Moreover, it is because the customary appointment of an heir does not, like legal adoption, simulate natural birth, that there are no restrictions with regard to the selection or age of the person appointed. (*n*.) An heir adopted in the manner above described does not thereby ordinarily lose his right to succeed to property in his natural family, at least as against collaterals. Nor, on the other hand, does the heir acquire a right to succeed to the collateral relatives of the person who appoints him, where no formal adoption has taken place, inasmuch the relation established between him and the appointer is a purely personal one. (*o*.)

(*m*) J. N. Bhattacharya's Hindu Law, p. 153.

(*n*) Notes on Customary Law by Bulnois and Rattigan, p. 131

(*o*) Rattigan s Digest of Customary Law, paras 48, 49.

NOTE :—As to onus in such case, *see* P. R. No. 138 of 1894.

Adopted sons in the proper sense of the term.

Of adopted sons in the proper sense of the term, the Smritis enumerate and describe five sorts,——the son given (Datta, Dattaka), the made or artificial son (Krita or Kritrima), the son self-given (Svayamdatta), the son bought (Boita), and the son cast-off (Apacidha, Apacidhaka.) Both the son self-given and the son cast-off are such as, being in distress and deprived of the assistance of their parents and other relations, have offered themselves in adoption to a stranger; they take a very low rank in the order of sons with most writers, and so does the son bought, who, of course could hardly have been rated more highly than a purchased slave. There exists a trace of the artificial son (Kritrima), having been originally acquired by means of fictive purchase. The Kritrima form of adoption, as described in the Smritis, may be compared in some respects to the *arrogatio*, or adoption of adult persons, and in other respects to the *adoptio minus plena*, or partial adoption of Roman Law. The Dattak form consists of the solemn adoption of a boy who has been voluntarily consigned by his natural parents to his adoptive parents. The ceremonies to be performed on this occasion are described in the Vasishta Smriti (xv. I,ii). (*p*).

Kritrima.

This form is unknown in practice, except in Mithila country. The consent of the adoptee, the party adopted, is necessary in this form and it must be given in the lifetime of the adoptive father. (*q*). There is no limit of age. The initiatory rites need not be performed in the family of the adopter and the fact that these rites are already performed in the natural family, is no obstacle. Any person may be adopted according to this form who is of the same tribe, whatever may be the nature of the relationship between the adopter and the adoptee. As regards succession, the Kritrima son does not lose his rights in his natural family. He takes the estate of his adoptive father only, but not of his father's father or other collateral relation, nor of the wife of his adoptive father. In fact the relationship here is limited to the contracting parties and the son of the Kritima does not take any interest in the property of the adopter. If a woman takes a Kritrima son he stands in the relation of a son to her only.

(*p*) T. L. L. for 1883 by J. Jolly, pp. 156, 157.

(*q*) Lachman Lal *v.* Mohan Lal, 16 W. R., 179.

He does not become the adopted son of her husband unless he is taken jointly by the husband and the wife. (*r*).

No Ceremonies or sacrifices are necessary to the validity of a Kritrima adoption, excepting the adopter saying—" Be thou my son," adoptee replying, "I am become your son." (*s*).

Kritrima form in Panjab.

Adoption of adults being common in the Panjab, and not being admissible under the Dattaka form, it has been inferred that the Kritrima form prevails here, whereas the truth probably is that neither form prevails, and that adoptions among agriculturists are generally informal and customary adoptions. (*t*).

Dvyamushayana adoption.

Dvyamushayana means a son of two fathers. In order to constitute a true Dvyamushayana a stipulation is required at the time of adoption to the effect that the boy shall belong to both fathers. This form prevails in Nambudri Brahmans of the West and in N. W. Provinces (*u*).

Who may give in adoption.

According to Vasishtha both parents have power to give a son, but a woman cannot give one without the consent of her lord. Manu says—He whom his father or mother gives to another, &c., is considered as a son-given, (*v*). No other relation but the father or mother can give away a boy. For instance, a brother cannot give away his brother. Nor can the paternal grandfather or any other relation. The authority to give in adoption cannot be delegated to another person, because the act when done requires parental sanction, (*w*) though when the necessary sanction has been given by an authorized person, the physical act of giving away in pursuance of that sanction may be performed by another. (*x*) The giver must be inspired by pure and disinterested motives.

(*r*) Shiboo Koeri *v.* Jagan Singh, 8 W. R., 155.

(*s*) 3 Sel. Rep., at p. 198, and Bhattacharya's H. L. p. 213.

(*t*) P. R. No. 147 of 1889, Opinion of Sir M. Plowden, page 503.

(*u*) *See* T. L. L. for 1883 by J. Jolly, page 165 and Mayne on H. L. . 160.

(*v*) Manu Ch. IX, page 168.

(*w*) Basshetiapa *v.* Shivlingappa, X, Bom. H. C., page 268,

(*x*) Venkata *versus* Subadra, VII, I. L. R., M. page 549,

A contract to give a son in adoption in consideration of an annuity is void (*y*). In default of the natural mother, a step-mother is not competent to give her step-son in adoption (*z*).

Who may be taken in adoption.

The adopted son shall be similar (*a*) to the adopter and shall resemble a natural son like his shadow. This is the Roman principle *Adoptio imitatus naturam.* The rules on adoption have been considerably influenced by it both in India and in Rome. Professor Jolly has shown that the theory that the adopted son must be the son of a woman whom the adopter could have legally married, is based on misconception and a mistranslation of a Sanskrit text by Sutherland and there is very little in Sanskrit treatises to warrant the formation of such a rule as this (*b*). A male child only can be adopted (*c*). He must be of the same caste (*d*). And must not be personally disqualified from performing the funeral obsequies. (*e*). When there is a brother's son eligible for adoption he ought to be taken (*f*).

(*y*) Eshan *versus* Harish, 21 W. R., page 381.

(*z*) Papamma *versus* Appa Ran, XVI, I. L. R., Mad., 384.

(*a*) Manu Ch. IX, 169. Medhatithi explains similar as denoting not one similar in class, but one endowed with qualities suitable to his adoptive family. The other Commentators refer this term to one equal in class (Varn) or caste Jati. Jolly's T. L. L. on H. L., page 157, foot-note.

(*b*) Nandpanditta formulated a theory that those only are capable of being adopted who might have been begotten by Niyoga and the like. This is an inference drawn from the principle that adoption imitates nature, and that the adopted son ought to resemble a natural son. The reason why connection by Niyoga is referred to, would seem to be this, that the fittest person to be adopted is a brother's son, just as the temporary intercourse called Niyoga had the procreation of a brother's son for its more ordinary object. Sutherland translated Niyoga into marriage thus, giving a wider scope to the doctrine. The doctrine itself was fallacious and its English rendering still further wrong. Moreover the doctrine of Niyoga has long since become obsolete and the theory has never been recognized as of any paramount authority. *See* Jolly's T. L L., on H. L., pages 162 to 164, also J. N. Bhattacharya's Commentaries on H. L. pages 167-168.

(*c*) Adoption of females not valid, I. L. R., XIII, Bom. 690.

(*d*) Manu Ch. IX., *v.* 168, P. R. 170 of 1882.

(*e*) Mayne on H. L. S., 127, also P. R. 25 of 1898.

(*f*) Rule is directory, *See* Gokala Nand *v.* Wormadei, 23 W.R., page 340.

Originally daughters were appointed to raise male issue and a *Putrika putra* ranked next only to Aurasa or legitimately born son. (*g*) A daughter's son is included in the list of heirs. According to all systems he comes in before brothers and other more remote Sapindas. The cause of this peculiar favour is to be found in the old practice of appointing a daughter to raise up issue for a man who had none. The daughter so appointed was herself considered as equal to a son. Naturally her son was equivalent to a grandson, and as the merits of a son and grandson are equal he ranked as a son (*h*). Subsequently the appointment of a daughter to raise up issue for her father became obsolete. But the fact of the nearness of daughter and daughter's son remained and their natural claim to succession on the ground of mere consanguinity recommended itself for general acceptance. Later on some new theories on the subject of a proper person to be adopted were introduced. It was stated for instance that no man should be adopted who is the son of a female with whom the adoptor could not have married while maiden. Professor Jolly, an eminent Sanscrit scholar, in his book on Hindu Law of Inheritance and adoption has pointed out the fallacy of this doctrine. (*i*) The late Mr. Vishva Nath Narayan Manlik in his translation of Vyavahara Mayukha supports him, so also does Mr. Golap Chandar Sarkar Shastri in his Tagore Law Lectures for 1888. Mr. Justice Chatterji seems to concur in this view, and Mr. Justice Clarke, Chief Judge, and Mr. Justice Walker following Bhagwan Singh, *versus* Bhagwan Singh, I. L. R., XVIII, All. p. 294, have held that under Hindu Law the adoption of a daughter's son is valid (*k*). But the case of Bhagwan Singh *versus* Bhagwan Singh went in appeal to the Privy Council and the judgment of the Allahabad High Court referred to above was upset. Nobody, however, appeared for the respondent and the judgment was *ex*

Daughter's son.

(*g*) See Mayne on H. L., § 55.

(*h*) Manu IX, § 127—136, Mayne on H. L., § 518.

(*i*) Tagore Law Lectures by J. Jolly for 1883, pp. 162 to 166. See also page 32 of this book.

(*j*) See case of Kartar Singh *versus* Mahtar Singh, P. R. No. 94 of 1898, p. 339.

(*k*) *Vide* Ganda Mal *versus* Thakar Mal, P. R. No. 97 of 1898.

parte (*l*). Under a Ruling of the Chief Court of the Punjab printed as P. R. No. 50 of 1874, the adoption of a daughter's son was held to be valid by the custom of the Punjab. But a later Full Bench Ruling has shifted the *onus* of proof on the person who alleges the adoption of a daughter's son to be valid by custom. (*m*)

Only son or eldest son.

The adoption of an only son or eldest son is valid. (*n*)

Age.

The age of the adopted boy should not be more than five years and the tonsure ceremony ought not to have been performed in the family of his natural father. But performance of *upanayna* (sacred thread ceremony) seems to be an absolute bar in the case of the Dwijas or twice-born classes. As regards Sudras adoption could be performed effectually till marriage. (*o*)

Ceremonies.

According to a principle of Hindu Law an invisible result cannot be created by a visible cause. The creation of a filial relation between strangers is an invisible result and it cannot be brought about except by Mantras and ceremonies prescribed by the Shasters. The performance of ceremonies not only secures publicity but the preparation gives time for deliberation. (*p*) The operative part of the ceremony is the actual giving and receiving of the child, being that part by which the boy is transferred from one family to the other. This actual giving and receiving cannot be completed by the mere execution of deeds. (*r*) In the case of the Sudras and in the Punjab the regidity of the rule regarding ceremonies is relaxed. (*s*) Moreover opinions on the necessity of customary rites to constitute a valid adoption have long been divided. (*t*)

(*l*) See I. L. R., XXI, All. 412, case of Bhagwan Singh *versus* Bhagwan Singh (P. C.)

(*m*) Ralla and others *versus* Budha and others, (F. B.) Ruling No 50 of 1893. Compare however Ruling No. 94 of 1898 and P. R. No. 34 of 1899, and Sultani *versus* Chujju, Case No. 711 of 1897, P.L.R., 1900, p. 292.

(*n*) Mayne on H. L. § 131 and I. L. R. XXI, All., 460 (P. C.)

(*o*) Mayne on H. L., § 128, 129, and I. L. R., IX, All., 253.

(*p*) Bhattacharya's H. L., p. 188.

(*q*) I. L. R., VI Cal 381, XIX, Cal., 452.

(*r*) P. R. No. 154 of 1884.

(*s*) Mayne on H. L., § 142 and Rattigan's Digest of Civil Law § 35, Explanation 4.

(*t*) T. L. L. on H. L for 1883, pp. 159-160. See also I. L. R., XI, Mad., 5.

Evidence of adoption.

No writing is necessary, though, of course, in case of a large property or of a person of high position, the absence of a writing would be a circumstance which would call for strict scrutiny, and for strong evidence of the actual fact. Where adoption has taken place long since, and where the adopted son has been treated as such by the members of the family and in public transactions, every presumption will be made that every circumstance has taken place which is necessary to account for such a state of things as is proved or admitted to exist. (*u*)

Res Judicata.

A decision in favour of adoption in a suit *inter parties* is not a judgment *in rem* or binding upon strangers or persons who were neither parties to the suit nor privies, but the proceeding in which the decree took place might be important as evidence. (*v*)

Lapse of time.

Lapse of time may operate in two ways, first, as strengthening the probability of an adoption; secondly, as barring any attempt to set it aside. In the latter case though the adoption could not be rendered valid, yet certain persons would be prevented from disputing it by the bar of estoppel or by the statute of limitation. The present Limitation Act XV of 1877, Article 118, provides a period of six years for a suit "to obtain a declaration that an alleged adoption is invalid or never in fact took place," the statute to run from the time "when the alleged adoption became known to the plaintiff." But this articles applies only to suits for a declaration of right. Suits for possession of property are governed by the twelve years' rule. (*w*)

(*u*) Rajendro Nath Banerji *versus* Jagendro Nath Banerji, 14 M. I. A. 67; P. R. Nos. 5 of 1874, 5 of 1881, Subo Bewa *versus* Nuboghun Mytu, 11 W. R. 380.

(*v*) I. L. R., XV. All. 261 (P. C.) and I. L. R., XXV, Cal., 523.

(*w*) Jaggan Nath Pershad, *versus* Ranjit Singh, I.L.R., XXV Cal., 355, Nathu Singh *versus* Gulab Singh, I. L. R., XVII, All., 167, Fannyama *versus* Manjaya Herbar, I. L. R., XXI, Bom., 159, P. R. No. 55 of 1897. The Madras High Court in Parvathi Ammal *versus* Saminatha Gurukul, I. L. R., XX, M. p. 40, takes a different view, but see the principles of the law of limitation discussed and explained by Mr. Justice Chatterji in P. R. No. 55 of 1897. The learned Judge dissents from this judgment and approves of the views in the Bombay Judgment, *see* pp. 242 and 243. P. R., for 1897.

The result of adoption.

The effect of a Dattaka adoption is that the boy is completely transferred from the natural family to the adopting family and is, as it were, born again in the latter family, so far as regards all rights of inheritance and the duties and obligations connected therewith. But it does not obliterate the tie of blood or the disabilities arising from it. Therefore, an adopted son is just as much incapacitated from marrying in his natural family as if he had never left it. Nor can he himself adopt a person out of his natural family whom he could not have adopted if he had remained in it. He succeeds to the property of the adoptive father both lineally and collaterally. (*x*) The adopted son cannot, after being adopted, claim the family or estate of his natural father, while no member of his natural family can succeed to him. (*y*)

After-born sons.

Where a legitimate son is born after an adoption, the latter is entitled to share along with the legitimate son, taking a portion which is sometimes spoken of as being one fourth and sometimes as being one-third of that of the after-born son. Among Sudras an adopted son and an after-born share equally. (*z*)

Effect of adoption by a widow.

When a widow has got the permission to adopt she cannot be compelled to act upon it unless she likes. (*a*) But as soon as she does exercise this power the adopted son stands exactly in the same position as if he were born to his adoptive father and his title relates back to the death of his father and he divests the estate of any person who may have taken possession in the *interim*. But if the estate has already vested in a person who would have had a preferable title to that of a natural born son, an adoption by the widow will not defeat the title of such person or his successor whether male or female, unless the successor be herself the widow who makes the adoption. (*b*)

(*x*) Uma Shanker Moitro *versus* Kali Komul, I. L. R., VI., Cal., 256 (F. B.)

(*y*) The general Customary Law of the Punjab as regards the right of collaterals in his natural family of a boy who is adopted is similar. See P. R. No. 12 of 1892, (F. B.)

(*z*) *See* Mayne on H. L. § 155.

(*a*) Bomun Das Mukerji *versus Mussammat* Tarni, 7, M. I. A., 169, Narain Mal *versus* Koer Narain Mytu, I. L. R., V, Cal., 251.

(*b*) *Mussammat* Bhobun Moyee Debia *versus* Ram Kishoro Acharaj Chaudhri, 10, M. I. A., 279.

Questions:

1.—What were the notions as regards adoption in early times?

2.—What was the object aimed at in this respect—

(*a*) in the case of ancient Societies like the Greeks and Romans;

(*b*) in the case of Aryans;

(*c*) in the case of a Panjabi agriculturist?

3.—Who can adopt a son?

4.—What are the rights of females in the matter of adoption?

5.—What is the nature of an adoption by a widow?

6.—In what way does the customary appointment of an heir in the Panjab differ from a Dattak adoption under the Hindu Law?

7.—Mention some of the forms of adoption recognized by Hindu Law? What forms are now current and in what localities?

8.—What are the points of difference between a Kritrima adoption and an adoption in the Dattaka form? Does the Kritrima eligibility form adoption prevail in the Panjab? What are its distinguishing features?

9.—Who may give a son in adoption?

10.—What are the cardinal rules relating to the selection of a boy for adoption?

11.—How have these rules been affected by the gloss of Commentators?

12.—What is the law as to the eligibility of a daughter's son for adoption?

13.—Is the adoption of an only son or eldest son valid under the law?

14.—What is the rule as to the age of a boy to be adopted?

15.—In what way is the performance of ceremonies

important in Hindu Law? What are the essential ceremonies, if any?

What is the rule on the point in the Panjab?

16.—How far a long course of treatment is relevant as evidence of an adoption having taken place?

17.—In what way a decision in favour of adoption in an inter parte suit admissible as evidence in suits between strangers?

18.—How does lapse of time in contesting an adoption affect its validity?

19.—What is the effect of a Dattaka adoption on the status of the adopted boy?

How is the adopted son affected by the subsequent birth of a legitimate son?

20.—What effect has adoption by a widow on her status?

In what way does it affect the rights of other persons who may have taken the estate in the interim?

CHAPTER VI.

Minority and Guardianship.

A minor means a person who under his personal law has not attained the age of majority, that is, the capacity of entering into contracts and assuming management of his own property. The period of minority according to Benares School lasts till the end of the 16th year; and according to the Bengal School till the end of the 15th year. The period is regulated now by statute under the Indian Majority Act IX of 1875. The ordinary period of minority is the completion of the 18th year, except when a guardian of the person or property of the minor has been appointed or declared by a competent Court before the minor has reached the age of 18th year, in which case the minority lasts till the end of the 21st year. (S. 3, Act IX of 1875). But if the appointment of a guardian by an original Court is set aside on appeal by the higher Court and the infant attains the age of 18 before another valid order for appointment of a guardian is made his disability would cease on completing the age of 18 years. (*c*). But this does not affect the capacity of any person with regard to marriage, dower, divorce or adoption or the religion or religious rites and usages of any class of Her Majesty's subject in British India, or the capacity of any person who before the passing of this Act has attained majority under his personal law. (S. 2, Act IX of 1875). Period of minority.

In the Panjab matters relating to guardianship are governed by custom in the first instance and by Hindu Law in the second instance when the minor is a Hindu, or by Muhammadan Law when he is a Muhammadan.

(See S. 5, Panjab Laws Act IV of 1872).

The Hindu Law vests the guardianship in the sovereign as *parens patrie*. Necessarily this duty is delegated to the child's relations. Of these the father and next to him the mother is his natural guardian. In default of her, or if she is unfit to exercise the trust, his nearest male kinsmen should be appointed, the paternal kindred having preference over the maternal. In an undivided family governed by Mitakshara Law, the management of the whole property including the Order of guardianship.

(c) Mussammat Chandan *v.* Mina Mal, App. Civil No. 1396 of 1899, Chief Court Judgment, P. R. 45 of 1900.

minor's share, would be vested in the nearest male and not in the mother. It would be otherwise if the family were divided. But this would not interfere with her right to the custody of the child itself. (*d*).

The appointment of guardian is now regulated by statute. Section 17, Guardian and Wards Act VIII of 1890, is to the effect that in appointing a guardian the Court shall be guided by what is best for the interest of the minor. The Court can pass over a person who has preferential right to being appointed under the personal law of the minor. (*e*).

Nature of guardian's right of custody.

The right of guardian to the possession of the infant is an absolute right, of which he cannot be deprived even by the desire of the minor himself, except upon sufficient grounds. Any contract made by the guardian as to the care and charge of their wards, if the interests of the minor are to suffer thereby, would be void as being opposed to public policy. (*f*).

Change of religion by parent.

The fact that a father has changed his religion, whether the charge be one to Christianity or from Christianity is of itself no reason for depriving him of the custody of his children. (*g*). It would be different, of course, if the change were attended with circumstances of immorality, which showed that his home was no longer fit for the residence of the child. (*h*). A child's religion is regulated by that of the father, therefore, when a mother changes her religion which would have the effect of changing the religion and the legal *status* of the infant, the Court would remove her from her position as guardian. (*i*).

Change of religion by minor.

A father is not disentitled to the custody of his minor son by the latter's change of religion. A Brahmin boy 16 years old was converted by a Christian Missionary to Christianity. On the father's suing for custody the boy was made over to him because he was a minor. The High Court

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(*d*) Mayne on H. L. D. 192.

(*e*) Must: Nihal Devi *v.* Deoki Nandan, P. R. No. 25 of 1881 and Must: Khem Kaur *v.* Guju Mal, P. R. No. 23 of' 78.

(*f*) See section 23, Indian Contract Act, Murray *v.* Sassoon Bin Solomon, P. R. 140 of 1879. Must: Sahib Zadi V. C. Newton, P. R. 15 of 1887. See also P. R. 145 of 1888 where the principles on the point are discussed by Justice Rattigan.

(*g*) Muchoo *v.* Arzoon Sahoo. V. W. R. 235, also Act XXI of 1850.

(*h*) R V. Bezonji Perry O. C. 591. Mayne on H. L., § 193.

(*i*) Skinner *v.* Orde, 14 M. I. A., 309, S. C. 17 W. R. 77.

held that the question was not affected by section 2, clause (*b*), Act IX of 1875, and that the period of parental control lasted until 18 years. (*j*) It is a criminal offence to entice from the keeping of its lawful guardian a male minor under the age of fourteen or a female minor under the age of sixteen (*k*).

Father may lose his right by acquiescence.

A was originally a Hindu and became a convert to Christianity in 1893. And left the family residence and his minor son remained in his grandfather's custody. The father after his conversion did not contribute towards the boy's support and in 1896 applied for the boy's custody who was 12 years old. Held that under the circumstances the father was not a fit guardian of the minor. (*l*).

Nature of contract by a minor.

A minor being incompetent to contract an agreement by him is not only discovered to be void but void *ab initio*. But there might be circumstances which may have misled the person dealing with the minor that the latter was of age and if he acted *boná fide* and only subsequently discovered the truth he is entitled to the benefit of section 65, Indian Contract Act. (*m*).

Estoppel.

A minor representing himself to be of full age sold certain property to A and executed a registered deed of sale. The deed contained a recital that he was 22 years of age. It was held, in a suit by him to set aside the sale on the ground of his minority, that he was estopped. (*n*).

Ratification.

A minor may on reaching majority ratify contracts entered into during his minority. (*o*).

Power of *de facto* guardian.

A *de facto* guardian of a Hindu minor has power in case of necessity to mortgage the minor's immoveable property, if she acts in good faith, and the minor will be bound by it. A *de facto* guardian can also sell the minor's property under like circumstances. (*p*).

(*j*) Reade *v.* Krishna, I. L. R., IX Mad., 391.

(*k*) I. P. C., Ss. 361, 363.

(*l*) Mokand Lal Singh *v.* Nobodip Chunder Singh, I.L.R., 25 Cal., 881.

(*m*) P. R. 23 of '83, I. L. R. 20 C. 508, I. L. R. 23, B. 13, I. L. R. 19, B. 701. See contra I. L. R., 18 C., 259, do. 13, B., 50, 18, M., 415.

(*n*) Ganeshi Lal *v.* Bapu, I. L. R. XXI B. 198—Compare I. L. R. 24 Cal, 265, do. 25 C. 616 and do. 26 C. 381, where the Bombay Ruling is dissented from.

(*o*) Chetty Colum *v.* Raja Rangsawmy 8 M. I. A. 319, I. L. R. 10 M., 272. See also authorities cited in Trevelyan on Minors, page 209.

(*p*) Hanuman Pershad Panday *v.* Must : Babooee Munraj Koomaree 6 M. I. A. 393. Mastu *v.* Nand Lal P. R. 73 of 1890, Mohanand Mandul *v.* Nafur Mandul, XXVI, C., 820,

Equities in favor of alienee. Whenever a transaction is set aside on the suit of the minor, the latter is bound to make good to the alienee any money which may have been applied to the benefit of his estate. (*q*).

Onus. In suits brought by minor to challenge a transaction entered into during his minority by his guardian the *onus* of proving the validity of the transaction is on the alienee. (*r*).

Informal appointment of guardian. The mere fact that there is no formal order of the Court under section 443, Civil Procedure Code, for the appointment of a guardian *ad litem* to a minor defendant does not vitiate the proceedings when it appears on the record that the Court had in fact, though informally, sanctioned the appointment of a certain person as such guardian. (*s*).

Decrees. A minor, who is properly represented in a suit, will be bound by its result, whether that result is arrived at by hostile decree, or by a compromise or by withdrawal. (*t*)

Gross negligence on part of guardian. The position of a guardian *ad litem* is that of a trustee and he is bound strictly to act in the interests of the minor. He has not the liberty of abandoning the case, as he would have were it his own, unless such abandonment is in the interests of the minor, and for the purpose of finding whether such guardian was guilty of laches or fraud in previous proceedings, the Court has power to go into them and to form its own conclusions regarding them. (*u*)

Compromise by guardian *ad litem*. Section 462 of the Civil Procedure Code requires an express sanction of the Court on an application made by the next friend for leave to withdraw or compromise, and in granting the sanction the Court must make due enquiry whether the withdrawal or compromise would be to the interest of the minor. Any such compromise or withdrawal made without such sanction would be invalid. (*v*) But the Court has no power to enforce a compromise, even though the terms of it might be beneficial to the minors, if the guardian *ad litem* objects to the same. (*w*)

Suits against guardians. A guardian is liable to be sued by his ward for damages arising from his fraudulent or illegal acts. For debts due by the ward, the guardian of course is only liable to the extent of the funds which have reached his hands. (*x*)

(*q*) Atma Ram *v.* Hunar, P. R. 96 of 1888.
(*r*) Lallu Singh *v.* Ragendur Laha, 8 W, R 364.
(*s*) Dhanpat Mal *v.* Khazana and others, P. R. 67 of 1897.
(*t*) Kumaraju *v.* Secretary of State, I. L. R. 11 M., 309.
(*u*) P. R. 35 of 1898
(*v*) P. R. 105 of 1889 and 17 of 1899.
(*w*) Raj Ram *v.* Ram Gopal, I. L. R., 23 M., 378.
(*x*) Sheikh Azeem-ud-din *v.* Moonshee Athur, 3 W. R. 137.

QUESTIONS :

1. What is the rule as to the age of minority under the Hindu Law.

2. How is the question affected by the Indian Majority Act IX of 1875?

3. What are the rights of a Sovereign in the matter of guardianship under the Hindu Law, and who are supposed to be the natural and proper guardians of a minor? Name them in order.

4. What principles guide the Courts in making an order for the appointment of a guardian?

5. What is the nature of a guardian's right as regards custody of a minor?

6. How does change of religion affect the right to custody of the minor:

(*a*) when the change of religion is by the father;
(*b*) when it is by the mother;
(*c*) when it is by the minor?

7. Under what circumstances, if any, may a parent lose his right to custody of his children?

8. What is the nature of a contract entered into by a minor?

9. Does the law of estoppel apply to the case of a minor?

10. What is the rule as to ratification of contracts by minors?

11. What is the rule as to equities in favor of an alienee from the minor?

12. On whom does the *onus* of proving the validity of a transaction entered into with a minor lie?

13. What is the effect of an informal appointment of a guardian?

14. How is a minor affected by decrees obtained against him and what is the power of the Court to go into the previous proceedings?

15. Subject to what restriction a guardian *ad litem* may compromise or withdraw a suit? What is the duty of the Court in this respect?

16. What suits may be brought against a guardian and what is the extent of his liability therein?

CHAPTER VII.

Joint Family.

Unity of ownership according to Mitakshara School.

The key-note of the whole Mitakshara Law is the following passage from Yajnavalka:—'The ownership of father and son is the same in land which was acquired by the grandfather, or in a corrody, or chattels.' (*a*). In the opinion of the Mitakshara, before partition has taken place, every parcener has his ownership fastened upon the whole of the joint property, comprising lands and cattle and gold and silver, and all other moveable effects, and even a trading business in which the family is concerned. There are as many ownerships as there are parceners. Those ownerships, each of them has the whole property for its object. No parcener can say that he singly is the owner of a particular share, one-third or one-fourth. As the Mitakshara makes the sons co-proprietors with the father, neither the father nor any one of the sons can at any given moment lay claim to a share numerically defined. By fresh additions to the joint family the shares vary. Not only birth but death also, affects the value of shares. This doctrine of the unity of ownership has been thus clearly set forth by the Privy Council in the case of Appovier *vs.* Ramsubha Aiyan :—"According to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of receipt of rent, and claim to take from the Collector or the bailiff of the rents, a certain definite share. The proceeds of the undivided property must be brought according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment of the members of an undivided family. But when the members of an undivided property agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership in certain defined shares; then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has henceforth a certain and definite share, which he may claim a right

(*a*) Mitakshara, translation by Colebrooke, Chap. 1, section 5, p. 3.

to receive and enjoy in severalty, although the property itself has not been actually severed and divided." (b).

This is the view of the school of aggregate ownership which extends over the whole of the north-west from the Vindhya Hills to the banks of the Indus, includes the Provinces of Oudh and Mithla, and includes also the whole of the Peninsula from the south of the Vindhya chain to Cape Comorin. There are minor differences in different localities, but nowhere in the above-mentioned area is the general proposition at all denied, nor are its plain deductions disregarded or rejected (c).

Bengal School.

The Bengal School is designated as that of "fractional shares." A Bengal joint family does not involve any joint rights as between a father and his sons. In it the joint rights are between brothers, or those who claim through brothers. A Mitakshara family involves joint rights as well between a father and his sons, as between different brothers or those who claim under different brothers. The shares in Bengal School can be numerically defined before partition. Nor does the value of those shares vary at different periods. There is no advantage or disadvantage to be gained or suffered by an early or late partition. Even before partition one member can go to the place of collection of rent and can demand from the bailiff his particular share of the collected rent. At least the share which he will obtain is definite and not liable to be increased or decreased at any future date, unless by succession to some other member, which is a different matter altogether.

Survivorship.

In a Mitakshara family the doctrine of survivorship prevails. This matter is explained thus by Sir Barnes Peacock in Sadabarat Pershad Lahoo *v.* Mt. Foolbash Kooer. (d). 'According to the Mitakshara Law if a member of a joint undivided family dies without a son, leaving a brother, his widow does not take his share by descent. If he leaves a son the son takes by descent, but if he leaves a widow, the survivors take by survivorship, legally and equitably for themselves, and not in trust for the heirs of the deceased. The deceased's heirs have no interest, either legal or equitable, in the share which passes by survivorship to the surviving co-sharers.'

(b) 11, Moore's I. A., 75, 8, W. R., P. C., 1.
(c) Krishna Kamal Bhattacharji's lectures on Joint Hindu Family, p. 173.
(d) Sadabarat Pershad Lahoo *v.* Foolbash Kooer 12, W. R., F. B., 1.

The doctrine of survivorship is totally inconsistent with the principle of fractional ownership. The Bengal School gives the widow of a person dying without male issue, the whole of his property, although he may have been joint with his brothers or other coparceners at his death.

Who are coparceners.

Co-ownership is not vested in all the members of a joint family. The joint family consists of all the descendants, male or female, of a married pair. The coparceners include only the male descendants to the fourth generation, and thus consists of the man himself, his sons, grandsons, and great-grandsons. This coparcenary title arises at birth, it is called an inchoate title, for it is not a complete one till partition. It represents a variable interest, being diminished by every successive birth of a male member of the family within three generations from the original owner, and being increased by every successive death of such coparcener. Each parcener has this inchoate and variable title fastened on the whole property so long as it remains joint. (*e*).

Rights of coparceners.

The relative rights during the continuance of the joint estate may be summed up as follows :—

(1). All coparceners can claim partition, assuming the ancestors above them are dead.

(2). All have rights to maintenance, and rights of maintenance belong also to members of joint family who are not coparceners.

(3). Coparceners can defeat alienations made without their consent.

(4). Some have rights of management.

(5). All acquisitions of property made by any member of the joint family with the use of the joint funds are joint estate. (*f*).

Obstructed and unobstructed property.

The same principle, *viz.*, that property vests in certain relations by birth and not in other relations, gives rise to a division of property into two classes, which are spoken of by Hindu Lawyers as Apratibandha and Sapratibandha terms which have been translated into unobstructed and obstructed. These terms are thus explained in the Mitakshara. (*g*).

(*e*) Cowell's Hindu Law, edition of 1895, p. 7.
(*f*) Do. do., do., p. 9.
(*g*) Mitakshara, I. 1, § 3.

"The wealth of the father or of the paternal grandfather becomes the property of his sons or of his grandsons, in right of their being his sons or his grandsons, and that is an inheritance not liable to obstruction. But property devolves on parents or uncles, brothers, or the rest, upon the demise of the owner, if there be no male issue, and thus the actual existence of a son and the survival of the owner are impediments to the succession, and on their ceasing, the property devolves on the successor in right of his being uncle or brother. This is an inheritance subject to obstruction." The distinction is the same as that which exists in English Law when we speak of estates vested or contingent, or of an heir as being the heir-at-law or the heir *presumptive*. The unobstructed or rather the unobstructible estate is that in which the future heir has already an interest by the pure fact of his existence. If he lives long enough he must necessarily succeed to the inheritance, unless his rights are defeated by alienation or devise; and if he dies his rights will pass on to his son, unless he himself is in the last rank of Sapindas, in which case his son will be out of the line of unobstructed heirs. On the other hand, the person who is next in apparent succession to an obstructed or rather an obstructible estate may at any moment find himself cut out by the inter-position of a prior heir, as for instance, a son, widow or the like. His rights will accrue for the first time at the death of the actual holder and will be judged of according to the existing state of the family at that time. Any nearer heir who may then be in existence will completely exclude him, and if he should die before the succession opens, even though he would have succeeded, had he survived, his heirs will not take at all, unless they happen themselves to be the next heirs to the deceased. In other words he cannot transmit to others rights which had not arisen on himself. (*h*).

Ancestral property.

Property which has been inherited as unobstructed property is ancestral. Property which has been inherited as obstructed property is not ancestral property. In other words, all property which a man inherits from a direct male ancestor, not exceeding three degrees higher than himself, is ancestral property and is at once held by himself in coparcenary with his own issue. But when he has inherited from a collateral relation, as for instance, from a brother, nephew, cousin or uncle, it is not ancestral property. Consequently his own

(*h*) Mayne on H. L., § 250.

descendants are not parceners in it with him. They cannot restrain him in dealing with it nor compel him to give them a share of it. On the same principle, property which a man inherits from a female, or through a female, as for instance, a daughter's son, or which he has taken from an ancestor. More remote than three degrees, or which he was taken as heir to a priest or a fellow-student, would not be ancestral property. And that which is ancestral and therefore coparcenary, as regards a man's own issue is not so as regards his collaterals; for they have no interest in it by birth.

On the other hand property is not the less ancestral because it was the separate or self-acquired property of the ancestor from whom it came. When it has once made a descent, its origin is immaterial. And all savings made out of ancestral property, and all purchases or profits made from the income or salary ancestral property would follow the character of the fund from which they proceeded. (*i*).

Panjab.

According to the Customary Law of the Panjab ancestral property means property inherited from a direct male ancestor, and, as regards collaterals, property inherited from a common ancestor. Property originally belonging to a common ancestor does not cease to be ancestral property, because it comes to a descendant of that ancestor through abandonment by a near relation rather than by simple inheritance. It also includes property to which a daughter and her sons have succeeded, but which, if descent had been through a son, would be ancestral property. Profits of ancestral immoveable property and purchases effected with such profits are not ancestral immoveable property under Customary Law, in such a sense that a descendant of the ancestor from whom such devolved can interfere with the disposal of such profits, property or purchases. Before, however, a person can claim any right on the ground of the property being ancestral he must be able to establish his title to succeed to it. (*j*).

Joint property.

Joint or coparcenary property is that sort of property in which two or more persons have an interest. Joint property is either ancestral property, jointly acquired property or property thrown into a common fund.

(*i*) Mayne on H. L. § 250, 251 *cf.* P. R. 4 of 1900.

(*j*) Rattigan's Digest of Customary Law, para. 59, Explanations I. and II and P. R. 43 of 1890, 31 of 1894, 32 of 1895, 4 of 1900, 69 of 1896.

Property jointly acquired.

Property jointly acquired by members of a joint Hindu family, either through their joint funds or their joint labour, is joint property (*k*).

Property thrown into a common stock

Though property be originally self-acquired, if it appears that it is voluntarily thrown into the Joint Stock, with the intention of abandoning all separate claims upon it, it would thereupon become joint property. (*l*).

Self-acquisition.

The whole doctrine of self-acquisition is briefly stated by Yajnavalka as follows : "Whatever is acquired by the co-parcener himself, without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs. Nor shall he who recovers hereditary property which has been taken away, give it up to the co-parceners; nor what has been gained by science." The Mitakshara adds that the words " without detriment to the father's estate" must be connected with each member of the sentence. " Consequently what is obtained from a friend as the return of an obligation conferred at the charge of patrimony ; what is received at a marriage concluded in the form Asur ; what is recovered of the heriditary estate by the expenditure of the father's goods ; what is earned by science acquired at the expense of ancestral wealth ; all that must be shared with the whole of the brethren and the father." (*m*). Jimut-Vahan lays it down, that where it is attempted to reduce a separate acquisition into common property on the ground that it was obtained with the aid of common property, it must be shown that the joint property was used for the express purpose of gain. It becomes not common merely because property may have been used for food or other necessaries, since that is similar to the sucking of the mother's breast. The subject was discussed by the Bombay High Court in Lakshman *v.* *Mussammat* Jamna Bai in which the Court remarked :—" We think that we shall be doing no violence to the Hindu texts, but shall be only adapting them to the condition of modern society, if we hold, that, when they speak of the gains of science which has been imparted at the family expense, they intend the special branch of science which is the immediate source of the gains, and not the elementary education which is the necessary stepping-stone to the acqui-

(*k*) Ram Pershad *v.* Sheo Charan, 10 M. I. A. 490, Radhabai *v.* Nanarao, I. L. R., 3, Bom., 151.

(*l*) Krishnaji *v.* Maro Mahadeo, I. L. R., 15, Bom., 32,

(*m*) Mitakshara, IV, §6, Mayne's H. L., § 257.

sition of all science." (*n*).

Onus.

Where the ancestral property is of trifling nature and could not be the germ of the wealth subsequently acquired, the property is self-acquired. (*o*). But where there is ancestral property by means of which other property may possibly have been acquired, it is for the party alleging self-acquisition to prove that it was acquired without any aid from the family estate. (*p*).

Presumption of union.

The normal state of every Hindu family is joint. Presumably every such family is joint in food, worship and estate. In the absence of proof of division such is the legal presumption. But the members of the family may sever in all or any of these three things, (*q*). It is settled law that the normal state of every Hindu family is joint, and in the absence of proof of division, the presumption of law is that every such family is joint in food, worship and estate: but this is only a presumption, and although perfectly true as an abstract principle, the degree of weight to be attached to it, or the extent of proof required to rebut it, must depend on the circumstances of each case and the way in which the principle is sought to be applied. Where, therefore, in a suit to recover possession of property alleged to have been held in joint ownership by the plaintiffs and their deceased uncle, and which it appeared was transferred by the latter to his wife by a registered deed of gift, it was established that some of the said property was ancestral, and it was not contended that it had ever been divided by metes and bounds, or that the plaintiffs had ceased to have a share in it, but what was contended was, that the shares in it had been so ascertained and dealt with that it had ceased to retain its character of joint undivided property, held, that the ordinary presumption must receive its full force, and that the *onus* clearly lay on those who asserted that what was the ancestral estate of a joint and undivided Hindu family had become separate by partition or otherwise. (*r*).

(*n*) 6. Bom., 225., p. 242. Krishnaji Mahadeo *v.* Moro Mahadeo, I. L. R., 15, Bom., 32.

(*o*) Ahmadbhoy *vs.* Kasimbhoy, I. L. R., 13, Bom., 534; 10 M. I. A., p. 505.

(*p*) Joti Ram and another, *v. Mussammat* Surasti and others, P. R. No. 13 of 1883.

(*q*) Per curiam, Nilkisto Debi *v.* Beer Chander, 12, M. I. A., p. 540.

(*r*) Joti Ram and others *v. Mussammat* Surasti and others, P. R. No. 13 of 1883.

There is a presumption that the normal state of every Hindu family is joint. The degree of weight to be attached to this presumption must depend on the circumstances of each case. When the family is proved to be joint the striking of a balance by one of the sons binds the other sons to the same extent as if he was their agent duly appointed, under section 251, Indian Contract Act. A manager of a Joint Hindu family under similar circumstances can give a valid discharge. (*s*). The presumption that when once a Hindu family is shown to have been joint, it is presumed to remain so until an actual partition is proved, is not applicable where it is admitted that a disruption of the unity of the family has already taken place. (*t*).

Acts of co-parceners.

The presumption as to the property of a Hindu family descended from a common ancestor remaining joint until partition is shown are presumptions of fact, such as are provided for by section 114, Indian Evidence Act. Such a presumption may be weakened or even rebutted by proof of facts which give rise to an inference that the property is held in separate ownership, even though there is no evidence of a formal partition. There may, however, be a partial partition of the family property, while the other members remain united. (*u*).

In the Panjab the true and perfect joint Hindu family of the Mitakshara rarely exists and disruptions of joint families take place without express partition. (*v*).

When there is a joint Hindu family with a father at its head, and one of the sons is appointed a *gomashta* and partner, all the members of the family, father and sons, do not thereby become *gomashtas* and partners. The members of such a family do not constitute a single person to all intents and purposes to a person who enters into partnership with one of them, and though they are all joint *inter se* as respects ancestral and it may be other property; as regards a stranger who enters into partnership with one of them, the other members of the family are strangers to the partnership. (*w*).

Appointment of one member of the family as gomashta and partner.

(*s*) Bicha Lal and others *v.* Jai Parshad and others, P. R. No. 45 of 1899; P. L. Reporter, Vol. I, p. 18. Case No. 1332 of 1896. (P. R. No. 45 of 1899). Also P. R. 63 of 1883 and 58 of 1882.

(*t*) Amir Chand *v.* Ghasita Mal, P. R. No. 143 of 1882.

(*u*) Budha Mal *v.* Bhagwan Das and others, P. R. No. 86 of 1886, upheld by the Privy Council. (I. L R., XVIII, C. 302).

(*v*) Rup Chand and Ram Das *v.* Basanta Mal and Relu Mal, P. R. No. 102 of 1889.

(*w*) Honda Ram and 2 others, *v.* Desu Ram and 2 others. P. R. No. 162 of 1888.

Position of manager.

So long as the manager of the Joint Family administers it for the purposes of the family, he is not under the same obligation to economise or to save, as would be the case with a paid agent or trustee. (*x*). The reason is that the manager is dealing with his own property, and if he chooses to live expensively, the remedy of the others is to come to a partition. On the other hand " he is certainly liable to make good to them their shares of all sorts which he has actually misappropriated, or which he has spent for purposes other than those in which the Joint Family was interested. No member of Joint Hindu Family is liable to his co-parceners for anything which might have been actually consumed by him in consequence of his having a larger family to support or because of his having a larger number of daughters to marry than the others. All such expenses are legitimately considered to be joint expenses of the family. (*y*).

The manager is the agent for the other co-parceners with authority to do acts for their common necessity or benefit. When there is good faith there is no right to an account by any co-parcener to rectify past inequality of enjoyment. Such co-parcener could at any time have claimed partition, and if he abstained from doing so he impliedly consented to what was expended. But there might be special circumstances which give rise to a right to an account. (*z*).

Manager can be called to account.

In Obhay Chunder *versus* Piyari Mohon Gooho (*a*) the question was referred to the Full Bench whether the managing member of a joint Hindu family can be sued by the other members for an account. Mr. Justice Mitter in making the reference said " suppose, for instance, that one of the members of a joint family, with a view to separate from the others, asks the manager what portion of the family income has been actually saved by him during the period of his managership. If the manager chooses to say that nothing has been saved, but at the same time refuses to give an account of the receipt and disbursements which were entirely under his control, how is the member who is desirous of separation to know what funds are actually available for partition? And

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(*x*) Tara Chand v. Reeh Ram 3 M. H. 177, Jagmohan Das, *v.* Monyre Das 10 B. 528.

(*y*) Saorpe Money Dasu v. Denobander 6 M. J. A. L. 540. Mayne on H. L. and 26.

(*z*) Cowell's Hindu Law, page 8.

(*a*) 5, B. L. R.. 347, 13 S. C. 13 § W. R. (F. B.) 75. See also Damodar Das *v.* Uttam Ram, 17 Bom., 271.

according to what principle of law or justice can it be said that he is bound to accept the *ipse dixit* of the manager as a correct representation of the actual state of things? The High Court held that the manager could be compelled to give an account.

Where there is an ancestral trade, the infant members of the joint family will be bound by all acts of the manager necessary to the carrying on of the business on the principle of a partnership amongst the members of the family including infants. (*b*). Ancestral trading business.

In transactions affecting corporate property all the co-parceners must be privy to it. A single member cannot sue or take out execution to recover a particular portion of the family property for himself, whether his claim is preferred against a stranger who is asserted to be wrongfully in possession or against his co-parceners. If any of the members refuse to join as plaintiffs, they may be made defendants. (*c*). Necessity of joint action.

On the other hand, where the act of a third party with respect to the joint property has caused any personal and special loss to one of the co-sharers which does not affect any others, he can sue for it separately and they need not be joined. (*d*). A mere trespasser may be sued by one co-sharer when the object is to remove him without claiming any special share for the co-parcener. (*e*). A member of a joint family who has contracted in his own name for the benefit of the family may sue upon the contract in their behalf without joining others. (*f*). A single member can sue alone when he has entered into a contract in his individual capacity. (*g*). Suit by one co-sharer.

When some of the co-sharers are minors it has been held that the managing member may sue on their behalf, but he could not do so on behalf of adult members of it. (*h*). Suit by manager.

In Madras a Karnawan, however, is invariably considered entitled to sue on behalf of the *tarwad*, as its representative. (*i*).

(*b*) Ram Lal Thakursi Das *v.* Lakhmi Chand Muni Ram 1 Bom. H. C. R., App., 15 I. L. R., 5 Bom. 38, I. L. R., 20 B. 767, and Mul Chand *v.* Sadhu Singh P. R. 59 of 1893, and P. R. 20 of 1897.

(*c*) Hari Gopal *v.* Gokal Das, 12 Bom. 158, Nareing Das *v.* Chela Ram, Punjab Chief Court case No. 169 of 1897 reported as No. 2 in Punjab Law Reporter, Vol. I. p. 4.

(*d*) Chandu *v.* Macnaghten, 23 W. R., 386.

(*e*) Radha Pershad *v.* Yusaf, 7 Cal. of 1888. 414, P. R. 74 of 1888.

(*f*) Bansi Singh *v.* Soodist Lal, 7 Cal, 739.

(*g*) Jugahai *v.* Rustamji, I. L. R., 9 Bom., 311.

(*h*) Sadula Khan *v.* Bhana Mal, P. R. 58 of 1882.

(*i*) Ramaya *v.* Venkat Rutnam I. L. R., XVII, Mad., 122—See also subject discussed in H. Chand's C. P. C., p. 396 to p. 400.

The manager of a tarwad, has in the management of tarwad property somewhat larger powers than are accorded to a Hindu manager. (*j*).

Enjoyment of family property.

A co-parcener cannot, without permission, do anything which alters the nature of the property; as, for instance, build upon it. Where such an act is an injury to his co-parcener or where the co-parcener is building on land in excess of that which would come to him on a partition, the Courts will compel him to remove the building or compensate the other co-sharers. (*k*).

The mere fact that one member of the family holds exclusive possession of any part of the property, carries with it no undertaking to pay rent, in the absence of some agreement to that effect, express or implied. (*l*).

Questions.

1.—What is the law as to ownership of property according to Mitakshara? And how has the Privy Council explained this view?

2.—In what way does it differ from the Bengal School of law in this respect?

3.—What do you understand by the doctrine of survivorship?

4.—Who are co-parceners and what are their rights under the Hindu Law?

5.—Explain the terms 'obstructed' and 'unobstructed' property?

6.—What is ancestral property according to Hindu Law? Does the Customary Law of the Panjab take any different view in this respect? Explain the difference, if any.

7.—What constitutes joint property?

8.—What view the Mitakshara takes in respect of 'self-acquired' property?

9.—What is the effect of elementary education acquired at the expense of the family estate? And what would be its effect if it were of a special nature which entailed unusual expenditure of the family property?

10.—What is the rule as to onus in the matter of a property being ancestral or self-acquired?

(*j*) Tod *v.* Kunhamad Hajee, I. L. R. 175. Mayne on H. L. § 268.

(*k*) Shadi *v.* Anup Singh, I. L. R., XII, All. 436, Hidayat Ali *v.* Basit Ali P. R. 54 of 1892.

(*l*) Gobind Chandar *v.* Ram Commar 24 W. R., 393.

What is the normal state of a Hindu family and what is the ordinary presumption in the matter :

(*a*) According to Hindu Law?

(*b*) According to Panjab Customary Law?

11.—What are the rights of the family members *inter se* in case one of them is appointed a Gomashta?

12.—What is the position of a manager of a joint Hindu family?

13.—What is the law as to his liability to be called upon for an account?

14.—When there is an ancestral family trade, what is the rule as to the liability of infant members of the family?

15.—In transactions affecting corporate property, is it necessary that all co-parceners be privy to it or be parties to a suit in respect thereof? In what cases may a co-parcener sue alone?

Is a managing member of the family entitled to bring a suit on behalf of the family or some of its members? If so, in what cases. What is the rule in Madras in this respect? Explain your answer giving reasons.

16.—What is the rule as to the enjoyment of family property by the co-parceners? What would be the course taken by the Courts if one member builds upon the family land without the consent of the rest?

CHAPTER VIII.

DEBTS.

There are three sources of liability for discharging a debt contracted by another :—

1. The relegious duty of discharging the debtor from the sin of his debts.

2. The moral duty of paying a debt contracted by one whose assets have passed into the possession of another.

3. The legal duty of paying a debt contraeted by one person as the agent, express or implied, of another. (*a*)

Limited to assets.

In Hindu Law a debt is not only an obligation but a sin, the consequences of which follow the debtor in the next world. The obligation is religious, but the liability is now limited to assets of the deceased inherited by the heir according to the law administered by the Courts in British India.

Cases in which it does not arise.

The sons are, however, not compellable to pay sums due by their father for spirituous liquors, for losses at play, for promises made without any consideration or under the influence of lust or wrath, or a fine or a toll, or any debt for a cause repugnant to good morals. (*b*). Ancestral property in the hands of sons is liable for a father's debt incurred as a surety (*c*).

Debt speed not be beneficial.

The freedom of the son from the obligation to discharge the father's debt has reference to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt. It is not founded on any assumed benefit to himself, or to the estate, arising from to the origin of the debt. It is the pious duty of the son to discharge it, provided, however, that it be not immoral (*d*). In cases governed by the Hindu Law of the Mitakshara, where a son sues for a declaration that a mortgage of the ancestral property made by his father and to which he is no party will bind the property only during the lifetime of his father, and is void as against himself, the plaintiff cannot obtain such declaration, unless it be shown that the debts of the father secured by the mortgage, were contracted for immoral purposes, and that the mortgagee had notice that they were so contracted. (*e*)

(*a*) Mayne on H. L. § 277.
(*b*) Do—§ 279.
(*c*) Tuka Ram Bhat v. Ganga Ram, I. L. R., 23 B. 454,
Amar Singh v. Aiz Din, P. R. 33 of 1892.
(*d*) Harnam Parshad v. Mussammat Babovee, 6 M. I. A., 421.
(*e*) Jamna Das and another v. Sardar Bhanga Singh and another, P. R, 93 of 1886.

Suits to set aside alienations.

In suits where a son, in a Hindu family governed by the law of the Mitakshara, seeks to set aside an alienation of ancestral property by his father, the rule of decision depends on whether the alienation in question has been made (*a*) in consideration of a loan, or of a payment made to the father on the occasion of his making the alienation, or (*b*) for the payment of antecedent debts. In the former case the person who takes an alienation is bound to establish, in a suit brought by a son to challenge its validity so far as it affects his interests, that the advance was made by him after a reasonable and fair inquiry which satisfied him, as a prudent man, that the money was required for the legal necessities of the family, in respect of which the father, as head and managing Member, could deal with, and bind the ancestral estate. In the latter case it is the duty of the son to establish that the debt in question was tainted with immorality. (*f*). Debts incurred in transactions the character of which is no more than imprudent, or unconscientiously imprudent, or unreasonable, are debts to which a pious duty attaches under the Mitakshara Law. (*g*)

Antecedent debt.

Antecedent debt means with regard to a mortgage a "debt antecedent to the transaction," and in the case of a proceeding by suit a "debt antecedent to the suit." (*h*)

Onus.

Ancestral property which descends to a father under the Mitakshara Law, is not exempted from liability to pay his debts because a son is born to him, unless the debt is illegal or has been contracted for an immoral purpose, in which case the son may not be under an obligation to pay it. A purchaser of a joint ancestral property under an execution is not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or having given it, in putting up the property for sale in execution. (*i*). Under Hindu Law a son cannot object to the sale of ancestral property in satisfaction of a judgment debt of his father, in the absence of proof that the debt was contracted for an immoral purpose. (*j*)

(*f*) Cheranjit Singh *v.* Telu Mal, P. R., 152 of 1888.
(*g*) Khalilul Rahman *v.* Gobind Parshad, I. L. R., 20 C. 329.
(*h*) Do—followed in P. R. 72 of 1898. See also Devi Ditta, and others *v.* Sandagar Singh and others (F. B., case No. 1199 of 1897, reported in P. L. R., Vol. I. p. 322) See P. R. 65 of 1900.
(*i*) Girdhari Lal *v.* Kantoo Lal, 22 Suth, W. R. 56 (P, C.)
(*j*) Ram Chand *v.* Gholu Shah, P. R. 87 of 1887.

Liability of a minor son.

There being no reason why a minor son should not, just as much as an adult son, be under a pious obligation to discharge his father's debts, the *onus* of proving that a father's debts were immoral when it is sought to set aside an alienation by the father, lies no less upon the minor sons than upon the adult sons, the former being in no better position than the latter. (*k*).

Father may alienate family property to satisfy his own debts.

Where such transactions affect a larger share of the property than a father's own share, the result evidently is that the sons are compelled indirectly to discharge during the father's life an obligation which in strictness only attaches to them at his death. (*l*).

Rules on the subject.

Mr. Mayne has deduced the following rules from a survey of the cases bearing on the subject:

I. That in cases governed by Mitakshara Law, a father may sell or mortgage not only his own share but his son's shares in family property, in order to satisfy an antecedent debt of his own, not being of an illegal or immoral character, and that such transaction may be enforced against his sons by a suit and proceedings in execution to which they are no parties. (*m*).

II. That the mere fact that the father might have transferred his son's interest affords no presumption that he has done so, and that those who assert that he has done so must make out, not only that the words in the conveyance are capable of passing the larger interest, but that they are such words as a purchaser who intended to bargain for such a larger interest, might be reasonably expected to require. (*n*).

III. That a creditor may enforce payment of the personal debts of a father, not being illegal or immoral by seizure and sale of the entire interest of the father and sons in the family property, and that it is not absolutely necessary that the sons should be a party either to the suit itself or to the proceedings in execution. (*o*).

(*k*) Jaggan Nath, minor, through Mussammat Lal Devi, *v.* Tulsi Das and another, P. R. 72 of 1898.

(*l*) Mayne M. L. Law, § 285, also Amar Singh *v.* Aziz Din, P. R. 33 of 1892, p. 132.

(*m*) Girdhari Lal *v.* Kantoo Lal, *see* Ante.

(*n*) Simbhu Nath *v.* Gulab Singh, 14 I. A. 77, 14, Cal. 572.

(*o*) Madan Thakoor *v.* Kantoo Lal, 22 Suth. W. R., 56 Nanom Bhusan v. Madan Mohan, 13 I. A. I.

IV. That it will not be assumed that a creditor intends to exact payment for a personal debt of the father by execution against the interest of the sons, unless such intention appears from the form of the suit, or of the execution proceedings or from the description of the property put up for sale, and the fact that the sons have not been made parties to the proceedings in execution is a material element in considering whether the creditor aimed at the larger or was willing to limit himself to the minor remedy. (*p*).

V. That the words "right, title and interest of the judgment-debtor" are ambiguous words which may either mean the share which he would have obtained on a partition, or the amount which he might have sold to satisfy his debt. (*q*).

VI. That it is in each case a mixed question of law and fact to determine what the Court intended to sell at public auction and what the purchaser expected to buy. That the Courts cannot sell more than the law allows. If it appears as a fact that the Court intended to sell less than it might have sold, or even less than it ought to have sold, and that this was known to the purchasers, no more will pass than what was in fact offered for sale. (*r*).

Son's right to set up immorality of debt against purchaser under decree.

An ancestral estate was put up for sale in execution of a decree against the father. The sons gave notice of their intention to bring a suit to release their shares as the debts were incurred for immoral purposes. The property was purchased by the auction purchaser after this. The sons in their suit to set aside the sale established that the debts were incurred for immoral purposes and not for the family's benefit. The Privy Council held that the purchaser must be deemed to have purchased with actual or constructive notice of the plaintiff's objections before the sale, and subject to the result of the suit to which the plaintiffs were referred. (*s*).

Liability of co-parceners taking by survivorship.

A creditor who has obtained judgment against a co-parcener for his separate debt may enforce it during the co-parcener's lifetime by seizure and sale of his undivided interest in the joint property. (*t*). If the debtor dies before

(*p*) Deen Dyal *v.* Jagdeep Narain, L. R. 4 I. A., 247.

(*q*) Namoni Babuasin *v.* Madan Mohan Ante and 8 Bom. 486, 17 Cal. 584. 96 A.

(*r*) Mohammad Abdul *v.* Kutul Husain, I. L. R. 9 All., 135 and Mayne H. L. § 296 A.

(*s*) Suraj Bansi Kanwar *v.* Sheo Pershad, 6 I. A., 88, S. C. 5 Cal. 43.

(*t*) Din Dayal *v.* Jagdeep 4 I. A. 247 S. C. I. L. R., 3 C. 193.

judgment and attachment of his undivided share the creditor loses his rights against the undivided share. (*u*).

Obligation arising from possession of assets.

Under Bengal law a co-parcener's share in undivided family property can be seized for his debts even after his death. This follows from the theory on which property is held according to the Daya Bhag. This does not rest as in the case of sons, upon any duty to relieve the deceased at any cost, but upon the broad equity that he who takes the benefit should take the burden also. Assets are to be pursued in whatever hands. (*v*).

Liability of a divided son where debts incurred by father before partition.

Property taken by a son in partition cannot be seized in execution in respect of an unsecured personal debt of his father, even though the debt was incurred before partition, provided that the partition is not shown to have been made with a view to defraud creditors. (*w*).

Decree against father how far binding against son.

The question how far the sons are bound by a decree against the father must be determined with reference to the particular facts of each case. If the father is manager and the question at issue is one which equally affects him and the other members of the family, and if the suit is properly defended the adjudication will bind all the persons interested with the father, since in that case it will be presumed that the father represents their interests. The sons will still more clearly be bound, if being of full age, and knowing of the litigation, they acquiesce in the conduct of it by the father. (*x*).

Effect of decree against manager for family debt.

Where a debt is incurred by a Hindu as manager of the family for family purposes, the other members of the family, though not parties to the suit, will be bound by the decree passed against him in respect of the debt; and if in execution of the decree passed against him in respect of the debt any joint property is sold, the interest of the whole family in such property will pass by the sale. (*y*).

Son's liability for father's debt in life-time of father.

A creditor of a Hindu brought a suit against him and his sons whom it was sought to make liable on the ground that the debts were incurred for the benefit of the family, but he did not obtain a decree against the sons :—*Held*, that the plaintiff could have prosecuted his claim against the sons in that

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(*u*) Ramanayya *v.* Rangapayya I. L. R. 17 Mad. 144. Madho Pershad *v.* Mehrban Singh, I. L. R. XVIII, C. 157, (P. C.) Mayne H. L. § 305 to 307.

(*v*) Narad cited by Jaggan Nath 1 Dig., 272, Mayne H. L. §§ 302, 303.

(*w*) Krishnasami Kanwar *v.* Rama Sami Ayyar, I. L. R.,22, Mad., 519.

(*x*) Kunjan Chetti *v.* Lidda Pillai, I. L. R., 22, Mad, 461.

(*y*) Lakha Ram *v.* Devji, I. L. R., 23, Bom. 372.

suit, and have obtained a decree making their shares in the family property liable for the father's debt. (*z*).

Mere relationship however close creates no obligation. The most common case is that of debts contracted by the manager of the family. He is, ex-officio, the accredited agent of the family, and authorised to bind them for all proper and necessary purposes within the scope of his agency. The householder is liable for whatever has been spent for the benefit of the family by the wife, agent or commissioned servant. Persons carrying on a family business in the profits of which all the members of the family would participate are considered to have authority to pledge the family property and credit for the ordinary purposes of the business. Therefore, debts incurred in that business have preference over the rights of the co-parcener in the joint family proprety. (*a*). Cases of Agency.

QUESTIONS.

I.—How many sources of liability are there for discharging a debt contracted by another? Name them.

II.—What view the British Courts have taken as to the extent of the liability of a son to pay his father's debt?

III.—In what cases this liability of the son does not arise under Hindu Law? What is the rule as to burden of proof in such cases?

IV.—Is the liability of a minor son the same as that of an adult in this respect?

V.—Can a father alienate a larger share of the family property than his own share for his debts?

VI.—What are the rules on the subject deduced by Mr. Mayne?

VII.—Can sons set up immorality of debt against a purchaser in execution sale?

VIII.—What is the rule as to the liability of a co-parcener for debts contracted by another co-parcener which have not been followed up by judgment and attachment of the co-parcener's undivided share before his death?

IX.—What is the obligation arising out of the possession of assets?

X.—How far a decree against a father is binding against the sons and their interest in the undivided property?

XI.—Can a son under any circumstances be made liable for his father's debts in lifetime of his father?

XII.—Give some instances of cases in which the obligation arises in the nature of an agency? What is the rule as to debts contracted in carrying on family business?

(*z*) Ramasami Nandan *v.* Ullaganath Goverdan, I. L. R., 22. Mad. 49. Mayne § 284, Cowell on H. L. (1899) p.p. 29 to 31.

(*a*) Per Poutifex J. Jahura Bibi *v.* Stri Gopal 1 Cal. 475—Mayne H. L. § 308.

CHAPTER IX.

Alienation.

In matters of alienation the primary points to be regarded are whether the property is ancestral or self-acquired : (*a*), whether it is moveable or immoveable. The next question will be the capacity in which the alienation is made by the alienor, *viz.*, whether in his own right or as manager of a joint Hindu family or as the guardian of a minor, or in the capacity of a co-parcener, or whether it was made by a male co-parcener or by a widow. After this the question will arise whether the alienation was by way of gift or for valuable consideration, whether it was for necessity or not, or for purpose binding upon the family or the heirs or co-parcners of the alienor (*a*).

Father's power over moveables.

The father has an independent power in the disposal of moveables for indispensable acts of duty, and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress and so forth. This is the view taken by Mr. Thomas Strange and Dr. Mayr. (*b*). Mr. Colebrooke and Mr. McNaughten hold that in regard to moveables the power of the father is limited by his own discretion and a sense of spiritual responsibility. (*c*). A Hindu bequeathed by his will nearly the whole of his ancestral moveable property to one of his sons. After his death the other son brought a suit to set aside the will for his share. The Court after reviewing the provisions of the Mitakshara and the Mayukha, set aside the will holding that it could not be recognized either as a gift or a partition. It would be impossible to hold a gift of the great bulk of the family property to one son to the exclusion of the other to be a gift prescribed by texts of law which distinctly prohibit such an unequal distribution. (*d*). Except in this instance and in regard to the liability for his debts, there is under Mitakshara Law no distinction between a father and a son. It is therefore an established rule that a father can make no disposition of the joint property which will prejudice his issue, unless he obtains

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(*a*) See pages 47 to 49 of this book.

(*b*). Mitakshara, 1, 1, §27, 1, Stra. H. L. 20, 261, Mayr p. 40.

(*c*). 2, Stra H. L. 9, 436, 441 ; 1, W. MacN. 3.

(*d*). Lakshman *v.* Ram Chandra 1, Bom. 561. Mayne on H. I. 6th Edn. §335.

their assent if they are able to give it, or unless there is some established necessity, or moral or religious obligation to justify the transaction. When his acts are questioned he has not even the benefit of a presumption in his favor that they were necessary or justifiable. (*e*).

Those having acquired an interest in the property by birth may object. A son cannot object to alienations validly made by his father before he was born or begotten (I. L. R. 5, B. 621). The right of an adopted son to object arises only from the moment of his adoption (*f*). Right to object.

A Punjabi agriculturist's rights as a reversioner are inherited or received from the common ancestor irrespective of the date of reversioner's birth. On the death of the sonless owner, the collateral heirs take the estate from the deceased as his heirs, and derive their title to possession of the ancestral land from him and through him from the common ancestor. The basis of the power of control is the fact that the land with which the proprietor is dealing is part of the original ancestral holding (P.R. 18 of 1895, P.R. 87 1895, page 418). Compare, however, P. R. 87 of 1900. Panjab.

A father after separation is freed from the control of his sons and can alienate the property at his pleasure. If the property be self-acquired he has the same unrestricted power over it, be it moveable or immoveable, and this is now the prevailing view of all the High Courts in India (*g*). Separate property.

Plaintiffs made title through their paternal grandmother and claimed a share in ancestral property left by her. Defendants pleaded that on the marriage of one of his brother's plaintiff's father, instead of contributing his share of the expenses in money, executed a release abandoning all claim to the inheritance. *Held*, that the release was a valid one, plaintiffs having failed to show that their father had other means of Legal necessity.

(*e*). Subrawarya *v.* Dadasio 13, Mad. 51.
(*f*). Rambhat *v.* Lakshman, 5, Bom. 630. Sadanand, *v.* Surjomonee 11, S. W. R. 436.
(*g*). Seetul *v.* Madho 1 All, 394, Subbanyya *v.* Surayya, 10 Mad. 251.

defraying his share in his brother's marriage expenses, which were necessary for the preservation of the family credit. (*h*). A decree was obtained against the manager of a banking business upon some dishonored Hundis drawn by the manager. The business belonged to an undivided Hindu family In execution of the decree ancestral immoveable property of the family was attached. *Held* that the property was liable to be sold in execution of the decree. (*i*). Money borrowed for the purpose of starting a trade to be carried on for the support or benefit of the family, is by Hindu Law a legal necessity for the alienation of the ancestral property (*j*).

Panjab. According to Hindu Law as interpreted in the Punjab, in the absence of proof of any custom, a Hindu father cannot alienate joint ancestral immoveable property without necessity even to the extent of the father's own share. Payment of the debt of the father, not contracted for an illegal or immoral purpose, may be a justifiable occasion for alienation. In a suit by the son of a Hindu Tarkhan (carpenter) to set aside the sale by his father of the family dwelling house, and recover possession thereof from the purchaser, it was found that of the whole purchase money paid to the father, a portion, Rs. 50, had been applied in payment of the father's legitimate personal debts. *Held* that the sale was of no effect against him, except to this extent, that he would not be entitled to be put in possession of the house on his father's death, until he had recouped the purchaser the sum of Rs. 50. But inasmuch as by general custom in the Punjab a son cannot compel his father to make a partition of joint ancestral immoveable property, nor compel his father to give him a portion of the house for residence, the plaintiff was not entitled to a decree against the purchaser (*k*).

(*h*) Narain and Hira *v.* Dhunna and others P. R. 63 of 1866.

(*i*) Kirpal Singh and others *v.* Lallu Mul and another. P. R. 64 of 1873.

(*j*) Achru Mall *v.* Jowala Das and another. P. R. 67 of 1873.

(*k*) *Mussammat* Thakuri, wife of Raman and guardian of Nanak *v.* Ganda Mal. P. R. No. 78 of 1879, see also P. R. 52 of 1884.

Father's want of capacity supplemented by consent of co-parceners.

Any want of capacity on the part of the father to alienate the family property, may be supplied by the consent of the co-parceners; such consent may be express or implied from their conduct at or after the time of the transaction. Where the property is invested in trade the manager will be assumed to possess the authority usually exercised by persons carrying on such business. (*l*).

Alienation by *de facto* manager.

The leading case on the subject is that of Hanuman Prasad Panday. That was the case of a mother managing as guardian the estate of an infant heir. Their Lordships remarked :—

"The power of the manager of an infant heir to charge an estate not his own is, under Hindu Law, a limited and qualified power. It can only be exercised rightly and in case of need, or for the benefit of the estate. But where in the particular instance the charge is one that a prudent owner would make, in order to benefit the estate, the *boná fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded."

"But of course if that danger arises, or has arisen, from any misconduct or advantage to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on a necessity which his own wrong has helped to cause, therefore, the lender in this case, unless he is shown to have acted *mala fide*, will not be affected, though it be shown that, with better management, the estate might have been kept free from the debt. Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as best he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that he is under such circumstances bound to

(*l*) Miller *v.* Ranga Nath Malik. 12, Cal., 359.

see to the application of the money. It is obvious that money to be secured upon any estate is likely to be obtained upon easier terms than a loan which rests on mere personal security, and that, therefore, the mere creation of a charge securing a proper debt cannot be viewed as improvident management; the purposes for which a loan is wanted are often future as respects the actual application, and a lender, unless he enters on the management, cannot have the means of controlling and directing the actual application. Their Lordships do not think that a *bonâ fide* creditor should suffer when he has acted honestly, and with due caution, but is himself deceived. (*m*)."

A *de facto* manager of an infant's estate has, in case of necessity or for the benefit of the minor, power to sell his property. (*n*).

Power to acknowledge debts.

The manager of a joint Hindu family has authority to acknowledge the liability of the family for the debts which he has properly contracted, so as to give a new period of limitation against the family from the time the acknowledgment is made. He is an agent duly authorized within the meaning of Section 19, Act XV of 1877. (*o*).

But the manager of a Hindu family has no power to revive by acknowledgment a debt barred by limitation, except as against himself. (*p*).

Burden of proving separation.

In a suit for money on book accounts against a Hindu and his four sons on the allegation that they were members of a joint Hindu family and kept a shop managed by one of the sons. *Held*, that there is a presumption that the normal state of every Hindu family is joint, the degree of weight to be attached to this presumption must depend more or less on the circumstances of each case. *Held*, that the sons must be considered partners in the business, and the act of one of them in striking a balance would, under Section 251, Indian Contract Act, bind the other members of the joint family to

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(*m*) Hanuman Prasad Pandey *v. Mussammat* Baboee Mundraj Koomaree. 6 M., I. A. 393. S. C. 18, Suth 81 note.

(*n*) Mahanund Mundul *v.* Nafar Mundul. 26 Cal., 820.

(*o*) Bhaskar *v.* Vija Lal. 17 Mad. 221.

(*p*) Dinkar *v.* Apaji 20 B. 155, Sobhanadri *v.* Sriramulul. 17 Mad. 221.

the same extent as if he was their agent duly appointed for the purpose. The word 'only' in Section 21, Limitation Act, means that it must be shown that the partner signing the acknowledgment had the express or implied authority of others to do so, and that in a going mercantile concern such authority is to be presumed as an ordinary rule. (*q*).

Onus of necessity in suits to enforce the mortgage.

Where the mortgagee is the original party suing to enforce his mortgage the *onus* ought to be upon him *prima facie*. If the mortgagee is not the original party, but his security is a substitute for an older security, the *onus* ought to be upon the persons challenging the transactions. (*r*).

Competency of a single coparcener to challenge alienation.

The managing member of an undivided Hindu family sued in his own name for recovery of certain land, and asked for a declaration that it belonged to the plaintiff's family. Plaintiff had an undivided brother, and there was no evidence that he assented to or acquiesced in the institution of the suit :—*Held*, that the plaintiff was not entitled to sue without making his brother, the other member of the undivided family, a party to the suit. (*s*).

Difference between father's debts and of a collateral.

There is a pious obligation in the son to pay the debt of his father, but as between brothers living in co-parcenary they are not mutually responsible for each other's personal debts. The rule, therefore, would be different where the rival interest of a collateral was concerned. (*t*).

Effect of decrees against father.

Where the decree is against the father, it conclusively establishes that there was a debt due by him, and as against his issue nothing more is necessary. The purchaser is not bound to go back beyond the decree, to ascertain whether the Court was right in giving the decree or having given it in putting the property for sale under a sale in execution upon it. (*u*).

(*q*) Bichha Lal and others *v.* Jai Pershad and others P. R. 45 of 1899

(*r*) Case of Hanuman Prasad Pandey 6 M. I. A. 418-420 P. R. 65 of 1900 (F R).

(*s*) Anga Muthu Pillsi Kolondavela Pillsi 23 Mad. 190 and C. C. No. 169 of 1887, published in P. L. R. Vol. I No. 2 of 1900.

(*t*) See per Mathuswamy Iyer J. *in re*, Ponnappa *v.* Pappuvayango 4 M page 33—Mayne on H. L, 6th Edn. page 466.

(*u*) Girdhari Lal *v.* Kantu Lal, 22 W. R. 56.

Ancestral debts.

Where a debt is ancestral and property is sold to meet it, the purchaser is not bound to inquire whether the debt could have been met from other sources, unless clear proofs were given of the immorality of the loan. (*v*).

Viyas says :—

Right of co-parcener to dispose of his share.

"A single parcener ought not, without the consent of his co-parceners, to sell or give away immoveable property of any sort, which the family hold in co-parcenary. But at a time of distress for the support of his household, and particularly for the performance of religious ceremonies, even a single co-parcener may give, mortgage or sell the immoveable estate." (*w*).

Seizure in execution.

But on equitable considerations it has been held now by the Privy Council and all the High Courts, that, under a decree against a co-parcener for his separate debts, a creditor may during the lifetime of the debtor seize and sell his undivided interest in the family property. (*x*). In Bengal the purchaser has been held entitled to be put into physical possession even of a part of the family house as the members hold in *quasi* severalty. (*y*).

Purcherer's remedy.

The remedy of the purchaser is by process direct against the owner of it, by seizure, or by sequestration or by appointment of a receiver. (*z*).

According to the view of the Bombay High Court the purchaser should bring a suit for partition of the entire family property. On the other hand, if purchaser has got into possession, the possession of the purchaser before partition is not that of a trespasser; the remedy of the other co-parceners is by

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(*v*) Anuragee *v. Mussammat* Bhagbatty Koer 25 Suth W. R, 148 and 22 W. R. 56.

(*w*) See per Mathuswamy Iyr J. Ponnappa *v.* Pappuvayyanger, 4 M. p 33—Mayne on H. L. 6th Edn. page 446.

(*x*) Viraswami *v.* Ayya Swami, Mad. H. C. 471. Pandnrango *v.* Bhaskar 11. B. H. C. 72. Gour Parshad *v.* Shev Din 4. N. W. P. 137. Deen Dyal *v.* Jugdeep Narain, 4. I. A. 247. Suraj Bansi Koer *v.* Sheo Pershad 5. C. 148. Rai Narain *v.* Nownit, L. Cal. 809.

(*y*) Ishan Chunder *v.* Nund Comar 8. Suth. 239

(*z*) Syad Tuffoozool *v.* Raghunath 14. M. I A. 50.

partition (*a*).

Conflict of authority as to voluntary alienation.

The Bombay and the Madras High Courts hold that a co-parcener can sell his share in the joint property himself. The Bengal High Court and the Allahabad High Court hold a contrary view. (*b*).

Alienation of share.

One of two brothers, members of an undivided family, had mortgaged one of two houses which had formed part of the family property for his own personal debt. The auction purchaser sued for possession against both brothers. The Court remarked, "What the purchaser or execution creditor of the co-parcener is entitled to is the share to which, if a partition took place, the co-parcener himself would be individually entitled, the amount of such share of course depending upon the state of the family (*c*).

Devise of undivided share.

The question was whether a devise by a father of ancestral immoveable property was valid as against his only son. The Court remarked:—"A co-parcener cannot before partition convey away, as his interest, a specific portion of his joint property. The person in whose favor a conveyance is made of a co-parcener's interest takes what on partition may be found to be the co-parcener's interest. At the moment of death, the right of survivorship is in conflict with the right by devise. The title by survivorship being the prior title, takes precedence to the exclusion of that by devise" (*d*).

Alienation of undivided share in Bombay.

Though according to the strict letter of Mitakshara Law and the practice of Benares and Mithla a co-parcener could not alienate his share in joint undivided immoveable and ancestral property, but according to the practice of Bombay Presidency such a right is recognized. (*e*).

Gift or devise invalid.

But even according to the Bombay High Court an undivided co-parcener cannot make a gift of his share, or dispose of it by will (*f*).

(*a*) Panduring *v.* Bhasker 11 B. H. C. 72. Venkata Ram *v.* Meera Labai. 13 Mad. 275. Maruti *v.* Lal Chand, 6 Bom. 564. Palani Konn Marakonan 20 Mad. 243. See Mayne on H. L. 6th Edn. page 458.

(*b*) Mayne on H. L. 6th Edn. §356.

(*c*) Viraswami *v.* Ayyaswami 1 Mad. H. C. 270 followed in Peddamuthulaty *v.* Timma Reddy. 2 M. H. C. 270. 4 M. H. 60.

(*d*) Vitla Butten *v.* Yamenamma. 8 M. H. C. 6.

(*e*) Vasudev *v.* Venkatesh. 10 B. H. Re. 139, Rangayana *v.* Ganpat Bhatha 15 Bom. 673.

(*f*) Kalu *v.* Basu 19 Bom. 803, Mayne on H. L. 6th Edn. §361.

Extent of share how ascertained.

In 1869 the question was referred to the Bengal High Court, and the Court replied that in cases governed by the Mitakshara Law one co-sharer had no authority without the consent of his co-sharers to dispose of his undivided share in order to raise money on his own account and not for the benefit of the family. The same view has been affirmed by the Privy Council as regards Bengal, Oudh and the North-Western Provinces. (*g*).

Equities in favor of alienee.

On equitable consideration the purchaser of a share of joint undivided property from a co-parcener is entitled to repayment of purchase money and to a lien for the amount on that share. (*h*). In no case can such an equity be enforced where the co-parcener who made the alienation is dead. Immediately on this event his share passes by survivorship to persons who are not liable for the debts, and obligations of deceased. (*i*).

Co-parcener's power of disposition in Punjab.

According to the Hindu Law as interpreted in the Punjab, no member of a joint Hindu family can, in the absence of custom to the contrary, alienate even his own share in the undivided estate, without the consent of his co-parceners : but such an alienation is not an act which is necessarily and *ipso facto* void, but is merely voidable by the co-sharers if they choose to repudiate it. In order to prove that the co-sharers assented to the transaction, all that need be established is, that having the power to forbid the act, which implies that they knew of it, they neglected to exercise it. (*j*).

Father's power of disposal in Bengal.

The dictum of the Sudder Diwani Adalat of Bengal on this point is the following :—" On mature consideration of the points referred to us, we are unanimously of opinion that the only doctrine that can be held by the Sudder Diwani Adawlat, consistently with the decisions, and the customs and usages of the people, is that a Hindu who has sons, can sell or give or pledge without their consent, immoveable ancestral property situate in the Province of Bengal, and, that, without the consent of the sons, he can by will, prevent, alter, or affect their succession to such property " (*k*). This case has ever since been accepted as settling the law

(*g*) Sadabart Parshad *v.* Foolbash Koer 3, B. L. R. 31, (F. B,) Chandra Koomar *v.* Harbans Sahai 16 C 137. Madho Pershad *v.* Mehrban Singh 18. C. 157, Bhagirath Misr *v.* Sheobhik 20 All. 325.

(*h*) Mahabir Pershad *v.* Ramyad 12. B. L. R. 90, S. C. 20 W. R.

(*i*) Madho Parshad *v.* Mehrban Singh, 17, I A. 194, 18 Cal. 157. 192.

(*j*) P. R. 21 of 1879, 153 of 1883 and 6 of 1893.

(*k*) Juggomohan *v.* Nemoo, Morton 90, Motee Lal *v.* Mitterjit 6. S. D. 73-85.

in Bengal, and it makes no difference that the property is impartible, and descends by the rule of primogeniture. (*l*).

Co-parcener's power of disposal in Bengal.

In Bengal a co-parcener can alienate his own share in joint ancestral immoveable property as against his co-sharers. The right of every co-parcener is to a definite share, though to an unascertained portion of the whole property. (*m*).

Gifts.

Gift consists in the relinquishment of one's right and the creation of the right of another. The creation of another man's rights is completed on that other's acceptance of the gift but not otherwise. Acceptance is made by three means, mental, verbal or corporeal. Mental acceptance is the determination to appropriate verbal acceptance; is the utterance of the expression, this is mine, or the like; corporeal acceptance is manifold, as by touching. (*n*).

Possession.

The doctrine that possession is necessary to complete a gift has been recognized by the British Courts since very early times and enforced. (*o*).

What amount to possession.

To complete a gift there must be transfer of the apparent evidences of ownership from the donor to the donee. It is sufficient if the change of possession is such as the nature of the case admits of. (*p*).

Donee must be in existence.

Whether the gift be in present or in future the donee must be a person in existence, and capable of accepting the gift at the time it takes effect. The only exceptions are the case of an infant in the womb, or a person adopted after the death of the husband under an authority from him. (*q*).

Gift valid against creditors.

A gift once completed by delivery or its equivalent is binding upon the donor or himself, and upon his representative, and is valid even against his creditors; provided it was made *boná fide*, that is, with the honest intention of passing the property, and not as a fraudulent contrivance to conceal the real ownership (*r*).

Writing is not necessary, under Hindu Law, to the validity of any transaction whatever. (*s*). Nor is there any

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(*l*) See per curium, Ramkishore *v.* Bhoobunmoye S. D. 1859, 250

(*m*) Daya Bhaga XI, I, §26.

(*n*) Mitakshara iii §§5 and 6.

(*o*) 2 Str. H. L. 426. Vasudev *v.* Narain 7 Bom. 131, Vasudev Bhat *v.* Narain Dayi Dhule 7 W, 191. Abaji Ganga Dhar *v.* Mukta 18 Bom. 688. See also §122, 129 Act IV of '82.

(*p*) Bank of Hindustan *v.* Premchand 5 B. H. W., (O. C. J.) 83.

(*q*) Bai Mamubai *v.* Dossa Moraji 15 Bom., 443. Tagore *v.* Tagore on appeal 13 W. R. 359 (P. C.) p. 365.

(*r*) Rai Bishen Chand *v.* Asmaida Koer, 6 All. 560, Ganga Bakhsh *v.* Jagat Bahadur 23 C. 15. Raja Ram *v.* Ganesh 23 Bom. 131.

(*s*) Srinivasammal Vizazammal, 2 Mad. H. C. 37. Hurpershad *v.* Sheo Dyal, 3 I. A. 259. S. C. 26 W. R. 55.

distinction between moveable and immoveable property as to the mode of granting it. (*t*).

Facts not invalidating gifts under Hindu Law.

A gift otherwise valid is not rendered invalid :—

(*a*) by being made in contemplation of death and subject to a conditional right of resumption in case of the donor's recovery. (*u*).

(*b*) by being made to depend on a contingency. Conditional gifts are valid according to Hindu Law, unless the conditions are illegal or immoral, in which case generally the gifts stand and the conditions fail. (*v*).

A gift made to a wife and mother from affection is by Hindu Law irrevocable by the donor. (*w*).

Invalid gifts.

A gift will be invalid which creates an estate unknown to, or forbidden by, Hindu Law. The leading case on the subject is Tagore *versus* Tagore (*x*) decided by the Privy Council in 1872. It lays down these general principles as affecting the transfer of property wherever law exists, which cannot therefore be lost sight of in regulating transfer by Hindus.

(1)—A private individual who attempts by gifts or will to make property inheritable otherwise than as the law directs is assuming to legislate, and the gift must fail, and the inheritance take place as the law directs.

(2)—With reference to transfers by gift a benignant construction is to be used ; the real meaning shall be enforced to the extent and in the form which the law allows.

(3)—All estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such. (*z*).

(*t*) Seebkisto *v.* E I. Company, 6 M. I. A. 278.
(*u*) Visalatchmi *v.* Subba Pillai, 6 Mad. H. C. 270.
(*v*) Ram Sarup *v.* Bela I. L. R. 6 A 313.
(*w*) Banke Rai *v.* Madho Ram, and others, P. R. 153 of 1883.
(*x*) 4. B. L. R. 159. 18 W. R. 359.
(*z*) Cowell's Hindu Law, page 62.

QUESTIONS.

1. What are the primary considerations in matters of alienation?

2. What power has the father got over moveable property of a joint Hindu family?

3. Who can object to father's disposal of such property?

Is there any distinction between the Hindu Law and the Punjab Customary Law on the point? State, if any.

4. What power has the father after separation over the once joint property?

What power has he over self-acquired property?

5. What is the father's power of alienation of ancestral immoveable property in the Punjab?

6. What power has the father got over joint ancestral immoveable property?

7. What effect has the consent of the coparceners over father's alienations?

8. What power of alienation has the *de facto* manager of a Hindu minor got?

(*a*) to charge the immoveable property.

(*b*) to sell it.

(*c*) to acknowledge debts.

(*d*) to revive time-barred debts.

9. Upon whom is the onus of proving separation in a Hindu family?

10. What is the rule as to onus of necessity?

(*a*) when the mortgagee as original party enforces his own debts.

(*b*) when his security is a substitute for an older security.

11. Is a single coparcener competent to challenge an alienation of ancestral property without making other coparceners parties to the suit ?

12. What is the difference in the matter of liability between a father's debts and of a collateral's debts ?

13. What effect has a decree passed against the father upon his sons' rights ?

14. What power of alienation is possessed by a coparcener regarding joint ancestral immoveable property ?

15. What is the remedy of an execution creditor against such a coparcener ?

16. What is the effect of a devise made by a father of ancestral immoveable property against his only son ?

17. What power of gift does a coparcener possess over joint ancestral immoveable property ?

18. What are the equities in favor of a purchaser of a share of joint ancestral immoveable property ?

19. What effect has the death of the alienor in such cases upon the alienee's rights ?

20. What is the power of a coparcener in the Punjab to alienate joint ancestral immoveable property ? Is the alienation void or voidable only ?

21. What is the father's power of disposition of ancestral immoveable property under the Bengal School ?

22. What is necessary to create a gift ?

23. Is possession of donee necessary for making a gift effectual ?

24. Should the donee be in existence ?

25. What is the effect of a gift against creditors ?

26. What facts do not invalidate a gift under Hindu Law ?

27. Can a donor prescrible a new line of descent of property not sanctioned by Hindu Law ?

CHAPTER X.

WILLS.

Antiquity of wills.

Wills are said to have been unknown to early Hindu law which has no word to express the idea of testamentary disposition. The selection of a successor by a dying *karta* of a Hindu family contrary to the rule by which the eldest surviving member of the family would become its head, and the exercise of the power of adoption were expedients frequently resorted to, and show that the Hindus were familiar in very early times with a distortion of the ordinary family descent. The writing whereby a husband empowers his widow after his death to adopt for him, is a document of testamentary character and incidents and is often treated as a will in reported cases. Mahants of temples also frequently appointed, and continue to do so, their successors by word of mouth or by writing, the appointment taking effect from the moment of their death. The Hindu wills appear to have been in use throughout India before the establishment of English Courts. (*a*).

Extent of testamentary power.

The extent of testamentary power, after being subject to much discussion, has at length been finally settled by decisions, and by express legislation as far as Allahabad and the Presidency towns are concerned. Whatever property is so completely under the control of the testator that he may give it away during his life, he may also devise it by will. (*b*)

The principle which regulates the extent of the testamentary power, both as regards the subject of the devise, and the character of the disposition is that laid down by the Privy Council in Sonatun Bysack *versus* Sreemuty Juggutsoondery Dosee "that the extent of the testamentary power of disposition by Hindus must be regulated by the Hindu law." (*c*)

(*a*) Cowell's Hindu Law, Chapter XI, Edition of.

(*b*) Mayne's Hindu Law, pages 537,538 (Edition of 1900), Act XXI of 1970, (The Hindu Wills Act), and I. L. R., 22 M. 9. Compare however P. R. 24 of 1898 and 22 of 1899, page 127.

(*c*) 8 M. I. A. 85.

A Hindu cannot give by will any greater estate than the law allows him to do in the case of an alienation the operation of which may take effect during his life He cannot create an estate unknown to Hindu Law, nor can he assume to legislate in any other way, as for instance, by prescribing a course of succession different from the legal one. He cannot prescribe a new order of succession, as for instance, one which should exclude females or adopted sons (*d*). A tesator can only dispose of his property by a valid exercise of testamentary power. Where he does so to that extent he over rides the law of inheritance, but if he fails to do so the law of intestate inheritance will dispose of the estate, and any negative directions that it shall not devolve in the way in which the law directs, or that it shall devolve by some rule contrary to that law, will be disregarded. So also trusts to accumulate the proceeds of property have been held invalid, the condition is an illegal one (*e*).

Invalid wills. Indefiniteness.

A will, the terms of which are so vague that it is not possible to ascertain what the objects of the testator are, will fail. A bequest made by a testator to *dharm* which he explained to be " doing all good works of a permanent nature " and " acting in such a manner as to give him a good name," is void and inoperative. (*f*).

Mitakshra law.

An undivided coparcener cannot without his co-sharer's consent either give away by gift or devise by will, even his own share of the joint property, because at the moment of death the right of survivorship is in conflict with the right of devise, and the title by survivorship being a prior title takes precedence to the exclusion of that by devise. (*g*).

(*d*) Surya Rao *versus* Ganga Dhar 13 I. A. 97.

(*e*) Kumar Asima *versus* Kumar Krishna 2 B, L, R. (O. C. J.) 11.

(*f*) Morarji *versus* Nenbai 17 Bombay 351, Ranchordas Vandravan Das and others I. L. R. 23 B. 725.

(*g*) Vitla Butten *versus* Yameenama 8 M. H. C. 6. Hammant Ram Chandra *versus* Bhimacharya 12 Bombay 105.

A Hindu who has sons can sell, give or pledge, without their consent, immoveable ancestral property, and can by will prevent, alter or affect their succession to such property. (*h*) Bengal Law.

A husband, has subject to wife's right to maintenance only, full power to dispose of all his property. (*i*).

The will of a Hindu may be oral, though, in such cases, the strictest proof will be required of its terms. (*j*).

General rules of Construction.

The Hindu Law, no less than the English law points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaniug to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances, no doubt, must be regarded. Amongst the circumstances thus to be regarded is the law of the country under which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption. (*k*).

Donee must be in existence at death.

The donee must be a person capable of taking at the time when the gift takes effect, and must either in fact or in contemplation of law be in existence at the death of the testator. (*l*)

Capacity for making a will.

Every person of sound mind who is not a minor may make a will subject to such limitations as are prescribed by his personal law.

(*h*) Juggomohan *versus* Neemoo, Morton 90.

(*i*) Sorolah Dossi *versus* Bhoobun Mohan Neoghy 15 Calcutta 292. See also Srimate Hemangini *versus* Kedar Nath 16 Cal., 758 and Mayne on Hindu Law (6th Edition), p. 816.

(*j*) Beer Pertap *versus* Maharaja Rajendra 12 M. I. A. 2, S. C. Suth (P. C.) 15.

(*k*) Sooryomoni Dasee *versus* Deno Bandhu Mullick, 6 M. I. A. 526,550.

(*l*) Tagor *versus* Tagor, 9 B. L. R. (P. C.) 577, S. C. 18 Suth 359.

Although in construing a will the Court should endeavour to gather the intention of the testator from the words actually employed by him, it is quite legitimate (subject to the express terms of the will) in construing the will of a Hindu with reference to the bequest in favor of a female to take into consideration ordinary notions and wishes of Hindus with-respect to devolution of property. Ordinarily their ideas are repugnant to giving a female a power of alienation over immoveable property, especially, if it is ancestral, and it may properly be presumed, in the absence of clear indication to the contrary, that a devise of such property to a Hindu female does not confer an estate of inheritance but only a life estate. Nor is it a neccssary inference from the use of the word *Malik* that she should be considered absolute owner of bequethed property.

Applying the above principles of construction to the present case, the Court held that as the words used by the testator on the whole admitted of the interpretation that it was intended to give her a life estate, such interpretation should have preference. (*m*)

Will, meaning of the expression "aulad".

Held, that in a document like a will the word "aulad" should be construed in its popular sense, and that the plain meaning of the word comprises both male and female issue. Krishna Bai Ram Chandra *versus* Bavabai XX Bombay 571 referred to in which the word children was used in the will. (*n*)

Attestation of will not necessary.

Attestation by witnesses is not required by law in the case of a will made by a Hindu in the Punjab.

A will made by a Hindu residing in the Panjab does not require to be executed in conformity with the provisions of Section 50, Indian Succession Act, 1865 : the will may be perfectly valid although not executed conformably with that section (*o*).

(*m*) Ralla Ram *versus* *Mussammat* Vedkour P. R. 27 of 1898, Chukhan Lal *versus* Talit Mohan I. L. R. XX C. 906, Mathra Das *versus* Bhikan Mal I. L. R. 19 A. 16.

(*n*) *Mussammat* Dhan Devi *versus* *Musammat* Malan P. R. 114 of 1900, Krishna Rai Ram Chandra *versus* Benabai I. L. R. XX Bombay 571.

(*o*) *Mussammat* Suriya *versus* Mani Ram and another P. R. 74 of 1891.

Revocation.

In the absence of any declaration by a testator of an intention to revoke a prior will the mere preparation by his direction of a document, which if executed would operate as a revocation, but which was never executed by him, cannot be regarded as amounting to a revocation (*p*).

Soundness of mind.

R. D. on his death-bed executed a will in favor of the Mahant of a religious institution. A writer was sent for and on his arriving R. D. was unconscious; he revived and the writer proceeded to draft the will, R. D. dictating at the request of G, one of the bystanders, who seemed to be anxious that the will should be made. Before the writing was finished R. D. again fainted and again revived when the dictation was proceeded with and R. D. directed G to affix R. D's seal to the instrument. R. D. himself also sealed the will. He died shortly after this. It appeared that R. D. had not till his last moments taken any steps to make a transfer of his property for the benefit of the religious institution, but he had said that as he was childless, he would make over his property to the Mahant and would go on a pilgrimage

Held, that R. D was not in a state to attend to important business, and that the will must be set aside for want of capacity (*q*).

In determining whether a testator was in such a mental condition as to be capable of making a valid disposition of his property by a testamentary instrument, the circumstance that he was on the verge of death is one to be considered but the mere fact that the testator died shortly after making the will is not of itself a sufficient ground for invalidating a will otherwise valid.

Proof that the testator knew what he was about, and intended to make the disposition of property contained in the will, is essential (*r*).

Undue influence.

A will must be free from undue influence. (*s*)

The principles which underlie sections 46 and 48 of Act X of 1868 are of universal application.

(*p*) Ram Narain *versus* Dye Ram and others P. R. 27 of 1883

(*q*) Mahant Radluka Das *versus* Bhagwan Das P. R. 7 of 1874.

(*r*) *Mussammat* Jassi *versus* Pokhar Mal P. R. 51 of 1882, Thakur Dabee *versus* Rai Balak Ram 10 Suth W. R. (P. C.) 3. See also Syad Muhammad *versus* Fateh Muhammad I. L. R. XXII C. 324 (P. C).

(*s*) *Mussammat* Bali *versus* *Mussammat* Hussan Bibi P. R. 55 of 1894. See also Kirpa *vesus* Tiruth P. R. 50 of 72 and in the matter of the will of Sardar Dyal Singh Majithia P. R. 63 of 1900.

QUESTIONS.

I. Are wills known to early Hindu Law? Explain how they came to be recognized amongst Hindus?

II. What is the rule as to the extent of testamentary power of disposition amongst Hindus?

III. What is the effect of vagueness as to the object of the will?

IV. Can a co-parcener under the Mitakshara law make a valid disposition of his undivided share by will? If so, under what circumstances?

V. What is the rule according to Bengal law on the subject?

VI. Are there any special rules as regards the form or attestation of wills amongst Hindus? Can there be an oral will?

VII. What circumstances are to be taken into consideration in interpreting the will of a Hindu?

VIII. In what sense is the word *malik* as applied to Hindu females generally taken? And what is the ordinary meaning of the term 'aulad' when used in a will?

IX. Is the existence of the donees necessary at death of the testator? Explain the rule, if any.

X. Who are competent to make a will?

XI, State the principles, if any, which should guide the Court in arriving at the conclusion that a testator was of sound mind?

XII. What is the effect of undue influence on a will? State some circumstances which would constitute undue influence?

CHAPTER XI.

RELIGIOUS ENDOWMENTS.

Possession not necessary to validate gifts.

Gifts for religious purposes are made by Kátayana an exception to the rule that gifts are void when made by a man who is afflicted with disease and the like, and he says, that if the donor dies without giving effect to his intentions, his son shall be compelled to deliver it. (*a*)

Creation of trust.

Ordinarily a trustee is appointed to manage the trust property for the idol in whose favor the trust is created. The owner may appoint himself the trustee and this he may do in two ways, either by absolutely giving property for the benefit of the trust or by merely charging the property for the maintenance of the trust. (*b*)

Charitable trust. Voluntary Settlement. Non-delivery of possession to trustee.

On the death of one S., his heirs executed a document assigning to plaintiffs for certain specific religious purposes the property of S., consisting of a *kuchha* house and outstandings, but the house or the securities for money were not made over to the plaintiffs. After this one of the defendants obtained a succession certificate in respect of the outstandings due to A. The plaintiffs sued to recover the nett amount so realized. *Held*, that without laying down any general rule that in all cases where moveable property is being dealt with, actual change of possession is necessary to perfectly create a trust, yet in the present case such delivery of possession was necessary to establish a complete divesting of themselves by the defendants of their interest in the property. (*c*)

(*a*). Manu, XI, 323. For the rule in the case of ordinary gifts see P. R. 45 of 1901.

(*b*). Mayne on Hindu Law 437,438. I. L. R. 11 All., pages 22-27, 3 C. 324.

(*c*). Ram Singh *versus* Santokh Singh P. R. 14 of 1896.

Dharmartha.

A father can make a gift of a small portion of ancestral estate without his son's consent for religious purposes. (*d*)

Powers of the manager.

A Mahant who holds the position of the manager of property of a religious institution, has the power in that capacity to alienate the property of a religious institution, if it is necessary to resort to this means of raising money for the purposes of the institution. In considering whether it was necessary to raise money for the purposes of the institution, the income as well as the necessary expenses for the institution must be taken into account, and it should further be shown how much of the money was required for the purpose : the power to incur debts binding the institution must be measured by the necessity of incurring them. He cannot charge the property for his own debts. But he may do any act which is necessary or beneficial, for the institution like the manager of an infant heir. (*e*)

Nirmala Sadhs of Amritsar.

By the custom of Nirmala Sadhs of Amritsar a chela who succeeds to the estate of his *guru* has no power to alienate any portion of the estate. (*f*)

Devolution of trust.

The devolution of the trust, upon the death or default of each trustee, depends upon the terms upon which it was created, or the usage of each particular institution, where no express trust-deed exists. (*g*)

Amritsar Golden Temple case.

In determining the right of succession to the office of *gaddi nashin*, the only law to be observed is to be found in the custom and practise which must be proved by evidence. No good ground existed for applying the doctrine of survivorship to the case of the Amritsar Golden Temple, there being no analogy between the three *gaddi nashins* of the Temple who were to all intents and purposes separate and not joint, and the case of an

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(*d*) Raghu Nath *v.* Govind. 8, All. 76.

(*e*) Prosonno *v.* Golab. 2. I. A. 145, Beshan Das *v.* Ghasita, P. R., 39 of 1882 and Rama Bugan *v.* Vythilingam, 16 M 490.

(*f*) Ram Singh *v.* Nehal Singh, P. R., 135 of 1889.

(*g*) I. L. R. XIII A 256, XV M 44,185 XVI All., 191, Rattigan's Digest of Customary Law, para 84.

undivided Hindu family among whom the doctrine of survivorship prevails (*h*).

Founder's rights of management.

Unless the founder has reserved to himself some special powers of supervision, removal or nomination, neither he nor his heirs have any greater powers in this respect than any other person who is interested in the trust (*i*).

Trust irrevocable.

A trust for religious purposes, if once lawfully and completely created, is irrevocable (*j*).

Who can sue to challenge improper alienation or encroachment.

All persons interested in the keeping up of the worship of the institution have a right to sue when an unauthorized alienation is made by the *Mohant* or the head of the institution.

Plaintiffs, who were residents in the Mohalla in which the temple in dispute was situate and supporters of the worship, were held to have *locus standi* to set aside an improper alienation of the property belonging to the temple. (Sukhram Das *v.* Sundur Mal, P. R., 75 of 1884).

This case was followed in Ram Partab *v.* Kalu Mal, (P. R., 27 of 1885) in which the worshippers at a shrine were held entitled to set aside a mortgage of the property as belonging to the shrine by the Puj In Sewa Singh *v.* Budh Singh, P. R., 66 of 1892, the same view was taken as in P. R., 27 of 1885, the worshippers at a Dharmsala were held to have a *locus standi* to challenge an alienation of its property (*k*).

(*h*) Bhai Bhagat Singh *v.* Harnam Singh, P. R. 49 of 1892.

(*i*) Lutchmee *v.* Rookman', Mad., December 1857 152.

(*j*) Juggutmohni *v.* Sakhi Money 14 M. I. A. 289, Ratigan's Digest of Customary Law, para 96, P. R., 100 of 1868.

(*k*) See also P. R. 29 of 1897 and Thaokersey *v.* Harbhuns I. L. R. 8 Bom. 433 Chentamau *v.* Dhado 15 B. 612, p. 623, Zafaryab *v.* Bakhtawar 5 A. 497.

QUESTIONS.

I. What is the rule as to delivery of possession in case of gifts for religious purposes?

II. State the rule as to how trusts are created.

III. What are imperfect trusts?

IV. What is the rule as to delivery of possession as to moveables?

V. What is the power of a father as regards gifting a portion of ancestral property to Dharamartha (religious purpose)?

VI. What powers does the Manager or Mohant of a religious institution possess as regards alienation of the property of the institution?

VII. What is the criterion for justifying such an alienation and to what extent?

VIII. What rule obtains amongst Nirmala Sadhs of Amritsar?

IX. What are the rules as to the devolution of trust property?

X. What rights does the founder of a charitable endowment possess in respect of management or control over the same?

XI. What trusts are irrevocable?

XII. Who can sue to challenge improper alienations of or encroachments upon trust property?

CHAPTER XII.

BENAMI TRANSACTIONS.

The practice of putting property into a false name is called benami. The fictitious owner is called the benamidar. The practice has been long since recognized by the Courts of India and by the Privy Council (a). Definition of terms, Benami, Benamidar

The law of benami is in no sense a branch of Hindu Law. In all cases of asserted benami the best, though not the only, criterion is to ascertain from whose funds the purchase money proceeded. Whether the nominal owner be a child or a stranger, a purchase made with the money of another is *prima facie* assumed to be made for the benefit of that other (b). Principles of Benami.

The assertion that a transaction is benami will be viewed by the Courts with great suspicion and must be strictly made out by evidence. But when the origin of the purchase money, or the fictitious character of the ownership, is once made out, the subsequent acts done in the name of the nominal owner will be explained by reference to the real nature of the transaction. The same motive which dictated an ostensible ownership would naturally dictate an apparent course of dealing in accordance with such ownership (c). Strict proof.

Where a transaction is once made out to be benami the Courts of India, which are bound to decide according to equity and good conscience, will give effect to the real title, unless the result of doing so would be to violate the provisions of a statute, or to work a fraud Effect given to real title.

(a) Mayne on Hindu Law 6th Edition p. 441.

(b) Pandit Ram Narain v. Moulvi Mohomed 26 I. A. 38, S. C. 26 C. 227, Ashabai v. Haji Tyeb 9 B. 15.

(c) Mayne on Hindu Law 6th Edition p. 442 Sreeman Chander v. Gopal Chander 7 Suth. W. R. (P. C.) 10, Nirmal Chander v. Mohamed Saddiq 26 C. 11, Renga Aiyar v. Srinavasa Aiyangar 21 Mad., 56 Oral evidence is sufficient, Kumara v. Srinavasa 11 Mad., 213.

Violation of statute.

upon innocent persons (*d*). For instance in sales under a decree of Court, or for arrears of revenue, the certified purchaser shall be conclusively deemed to be the real purchaser, and shall not be liable to be ousted on the ground that his real purchase was made on behalf of another (*e*). These provisions are only intended to prevent the real owner disputing the title of the certified purchaser but do not preclude a third party from enforcing a claim against the true owner in respect of the property purchased as benami (*f*).

Fraud on third parties.

The Judicial Committee has laid down that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be entitled to recover on his secret title, unless he can overthrow that of the purchaser, by showing either that he had direct notice, or something which amounts to constructive notice of the real title, or that there were circumstances which ought to have put him upon an enquiry, that, if prosecuted, would have led to a discovery of it (*g*).

Nature of notice.

Notice may be express or implied. Where the fact that the ostensible owner is only a benamidar is known to the person who deals with him and the transaction into which he enters is known and acquiesced in by the real owner, it becomes valid against him, as if he had been a party to it (*h*).

Pollock on Benami transactions.

The subject of Benami is discussed very ably and clearly by Sir F. Pollock in his Law of Fraud in British India at page 86 in the following terms,

'The beneficial owner is not allowed to undo his own act, even between himself and the benamidar where

(*d*) Thakrani *v.* Government 14 M. I. A., 112.

(*e*) Section 317 Act XIV of 1882 C. P. Code.

(*f*) Chandra Kaminey *v.* Ram Rattan 12 C. 302, Tirualayappa *v.* Swami Naik, 18 M. 469. Mayne, H. L. p. 443.

(*g*) Ram Coomar *v.* McQueen 11 B. L. R. (P.C.) 46 at p. 52.

(*h*) Sarju Pershad *v.* Bir Bhaddar 20 I. A. 108.

a fraudulent purpose has actually been effected by the transaction. The true owner is not prevented, by the mere fact of having made a fictitious sale, or taken a conveyance in another person's name, from showing what his real interest was, at all events where the transaction had not in the meantime had the effect of defrauding creditors or other innocent persons. It would seem the better opinion that it does not matter with what intent the more or less fictitious conveyance was made, provided that the fraudulent or illegal object, if any such there was, has, not been carried into execution to any material extent (*i*).

Fraud upon creditors.

A, with the intention of defeating and defrauding his creditors, made and delivered a promissory note to B without consideration, and collusively allowed a decree to be passed against him on the promissory note, and conveyed to B. a house in part satisfaction of the decree: and it appeared that certain of A.'s creditors were consequently induced to remit parts of their claims. A having died, his widow and legal representative under Hindu Law, now sued B to have the promissory note and the conveyance set aside and to have the defendants restrained by injunction from executing the decree. *Held*, (1) that the plaintiff was not entitled to relief in respect of the promissory note and the decree, although she was not personally a party to the fraud, in as much as she claimed through A by whose contrivance and collusion the defendant was enabled to obtain the decree, (2) that the plaintiff was not entitled to have the sale set aside in as much as there had been at least a partial carrying into effect of the illegal purpose in a substantial manner (*j*).

Par delictum Party stopped from pleading his own fraud.

The plaintiff sued for possession of half a house which he alleged was the joint property of himself and the defendant, the latter relied upon a registered deed of sale to him from the plaintiff purporting to sell plaintiff's half interest in the house. The plaintiff replied that this was a fictitious transaction entered

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(*i*) Quoted in Punjab Record 99 of 1895. p. 470.

(*j*) Rangam Mal *versus* Venkatachavi 18 Mad. 378, upheld in appeal and quoted at 22 Mad. page 323.

into in fraud of his creditors. *Held*, that the plaintiff was precluded by the rule of *par delictum* from relying on such an allegation (*k*).

H. D. now deceased a *Khatri* purchased a house in the name of his son L. D. who mortgaged it to the defendant for Rs. 600. Prior to the mortgage H. D. had died, leaving considerable property and was succeeded by his heirs as joint Hindu family. H. D's. widow and R. M. a son sued to contest the mortgage by H. D. to the defendant. *Held*, that the purchase of the honse by H.D. in the name of his son was benami, the father being the real owner, and that the father's heirs were not estopped from proving the real nature of the transaction even against a *bona fide* mortgagee from the benamidar. *Held*, that R. N. should recover possession of his half share unencumbered, the mortgage being valid only to the extent of L. D's. share. (*l*)

Fraud carried into effect.

Plaintiff, with the object of defeating the claims of his creditors, executed a colorable conveyance of his property in favor of another person, and the transferee successfully resisted the creditors of the plaintiff from seizing the property in execution of their decrees. The transferee then conveyed the property to a third party who took possession. *Held*, following the case of Kali Charan Pal *versus* Rasik Lal Pal (23 Calcutta 962 note) that the plaintiff was precluded from maintaining the action for the recovery of the property. *Held*, also that there was a distinction between those cases in which the fraud was only attempted and those in which it was actually carried into effect ; and that in the latter class of cases the Court would by granting relief to the wrong doer, be making itself a party to the fraud. (*m*)

Effect of Decrees.

Decrees are conclusive between the parties both as to the right declared, and as to the character in which

(*k*) Dogra Mal *v.* Jamiat P. R. 38 of 1892. See also P. R. 6 of 1901, compare P. R. 61 of 1895.

(*l*) Punjab Record 6 of 1893. Dharam Chand *versus Mussammat* Karam Devi.

(*m*) Goberdan Singh *versus* Retu Roy 23 Cal. 962. See also Rangam Mal *v.* Vaukat Chovi 18 Mad., 378, p. 387.

they sue. It is, however, allowable for a third person, who was not on the record, to come in and show that a suit was really carried on for his benefit or against a person who was not a party to it (*n*).

Benamidar should be a party.

As a general rule, it is desirable that the benamidar should be a party to all suits in respect of the property of which he is the nominal owner. But this is not necessary when there is no dispute as to the title being only apparent. In the absence of any evidence to the contrary, a suit instituted by a benamidar is presumed to be with the full knowledge of the real owner. (*o*)

Right of Benamidar to sue.

The benamidar is not merely an *alias*, or even an agent of the real owner. He is a person whom the owner for purposes of his own, which are not necessarily fraudulent, has chosen to represent the estate to the outer public, and whom he has furnished with the *indicia* of ownership to enable him to do so effectively. A wrong doer should not be allowed to resist a suit by the ostensible owner on the ground that he has no title or right of possession against the real owner. He has the title and right of possession which that person has given him, which is apparently enough to support the suit. It would be a different thing if the real owner had repudiated the benamidar, or had dealt directly with his tenants or others in respect of the estate. On the plea of defendants the real owner should be made a party to the suit, so as to be bound by the decision. (*p*).

(*n*). Lachman *v*. Patne Ram. 1 All. 510, Chonverapp *v*. Pattapa 11 Bom., 708.

(*o*). Gopi Nath *v*. Bhagwat 10 Cal., 697, p. 705, Shangar *v*. Krishnan 15 Mad. 267.

(*p*) Mayne on Hindu Law, 6th Edition, p. 582-583 and Yad Ram *v*. Umrao Singh, 21 All. 380.

QUESTIONS.

I.—Define the terms 'Benami' and 'Benamidar'.

II.—What is the criterion for determining that a transaction is benami? How do Courts view such an assertion?

III.—What principles guide the Courts in dealing with transactions alleged to be benami?

IV.—What would be the decision when the effect of a plea of benami is to work a fraud on third parties?

V.—What view Pollock takes of the question in his Law of Fraud?

VI.—When a benami transaction has the effect of defrauding one's creditors, how far is it open to a party to the transaction or his legal representative to disclose the real nature of the transaction?

Explain the doctrine of *par delectum*.

VII.—What is the effect of a decree on the right of a third person, not on the record, to show the real character in which the parties sue?

VIII.—Is benamidar a necessary party to a suit in respect of the property of which he is the nominal owner?

IX.—What are the rights of a benamidar to bring claims or actions in respect of the property standing in his name?

CHAPTER XIII.

MAINTENANCE.

From an examination of the texts of Hindu Law on the subject it would appear that the following persons are entitled to maintenance :— Persons who are entitled.

1. Father and mother.
2. Virtuous wife.
3. Infant children.
4. Grown up children who are destitute and dependent.
5. Persons who are excluded from inheritance for any cause other than degradation ; their sonless wives and unmarried daughters.
6. Widows of deceased co-parceners in a joint family (*a*).

Nature and extent of obligation.

The holder of ancestral property cannot, where there exists a widow having a right to maintenance out of that property, alienate such property so as to defeat the widow's right to maintenance. (*b*.)

Where property ancestral.

Where there is only self-acquired property, the only persons whose maintenance is a charge out of such property are aged parents, wife and minor children. (*c*).

The widow of a deceased co-parcener.

The widow of a deceased co-parcener could not be in a worse position than a disqualified heir, and she is entitled to be maintained in the same way after her husband's death as during his life out of the family property. (*d*). The widow of a deceased son, who lived in union with his father, has a legal right to maintenance from her mother-in-law out of the self-acquired property of the father-in-law to which his widow has succeeded as his heir. A son's widow has no legal claim for maintenance against self-acquired property in the father-in-law's hands, but when such property devolves upon his heirs the daughter-in-law has a claim against it in their hands for maintenance if her husband had lived in union with his father (*e*). The sons succeeding to their father's self-acquired property are under a legal obligation to provide maintenance for the widow of their deceased brother out of such property. (*f*). A Hindu died leaving

(*a*) J. N. Bhuttacharji's Hindu Law, page 396.

(*b*) Jamna *v.* Machul Lalu, 2 All., 315, Devi Persad *v.* Gunwante Koer, 22 Cal., 410 followed, Beche *v.* Mothina, 23 All, 86. P. R. 7 of 1871.

(*c*) Subharyana *v.* Subbakka, 8 Mad., 236.

(*d*) F. Lalti Kuav *v.* Ganga, 7 N.-W P. 261, followed in 23 All, 86.

(*e*) Janki *v.* Nand Ram, 11 All, 194.

(*f*) Kaminee Dassee *v.* Chander Pode, 17 Cal., 373, Devi Pershad *v.* Gunwanti Koer, 22 Cal., 410.

property with his widow, of which a portion was self-acquired, and the remainder had been inherited by him from his maternal grandfather. His son who had predeceased him left a widow who now claimed maintenance from her mother-in-law. *Held* that inasmuch as property inherited from a maternal grandfather is not self-acquired, the rule of non-liability for maintenance ought not to be extended to property of this description, which was liable to maintenance claimed. *Semble*, that the moral obligation to support a son's widow to which her father-in-law is subject, acquires on his death the force of a legal obligation as against his self-acquired assets in the hands of his heirs; and that a testamentary deposition of such property made in favour of volunteers by a person morally bound to provide maintenance, cannot affect the position of a party whose moral claim has become a legal right. (*g*).

Wife.

The maintenance of a wife by her husband is a matter of personal obligation arising from the marital relationship, and is independent of the possession of any property. Yajnyavalika says that great sin is incurred by not maintaining even a superseded wife. With regard to faultless wife, he says, that if the husband be poor he should be ordered to maintain her, otherwise the husband should be ordered to give her a third of his property. (*h*).

Effect of wife's living separate.

A Hindu wife is not entitled to maintenance if she leaves her husband's house without justifying cause. The husband's marrying a second wife is not such a justifying cause; if a Hindu, however, were to keep a Mohammadan woman in his house, and by such conduct compel her to leave his house and reside with her mother, she is entitled to separate maintenance. (*i*).

Effect of cruelty.

A Hindu wife is justified in leaving her husband's protection and is entitled to separate maintenance from his income when he habitually treats her with cruelty and such violence as to create the most serious apprehension for her personal safety. (*j*).

(*g*) Ranganmmal *v.* Echmmal. 22 Mad., 305. Compare Bai Parbati *v.* Tarwadi Dowlat Ram, 25 Bom. 263.

(*h*) J. N. Bhattarcharji's Hindu Law, p. 403.

(*i*) Sedlengaga *v.* Sidav. 2 Bom., 634, Verasami *v.* Apasami, 1 M. H. C. 375.

(*j*) Motingini *v.* Jogendro, 19 C. 84.

The amount depends upon the income of the husband and the number of dependents he has got and the social status of the wife. (*k*). Her own stridhan is not to be taken into account, if it is of an unproductive character, such as clothes and jewels. In the case of a widow she is not entitled to more than the share of the income of her husband out of the joint property. (*l*). The maintenance of a widow is not determined with reference to the principle that she is bound to lead the life of an ascetic. (*m*).

Amount of maintenance.

An unchaste wife is not entitled to maintenance, nor is an unchaste widow entitled to maintenance. Narad says, 'the widows keeping unsullied the bed of their lord are entitled to maintenance.' The unchastity of a widow deprives her wholly of her right to maintenance, and the fact that there has been an agreement as to maintenance makes no difference. (*n*)

Effect of unchastity.

Subsequent unchastity deprives a widow of her right of maintenance, when the same is given to her by her husband's heirs, but not when it is given to her by her husband or by her son, because these two would be bound to keep her from absolute destitution. But there are contradictory opinions as to whether her husband is not liable to furnish her with a bare subsistence. The obligation, if it exists, is dependent on the woman abandoning her course of vice. (*o*). A decree for maintenance can be set aside on proof of subsequent unchastity (*p*).

The case of a widow is very different from the case of a wife. A wife cannot leave her husband's home when she chooses and claims separate maintenance. But the case of a widow is different. All that is required of her is, that she is not to leave her husband's house for improper purposes, and she is entitled to retain her maintenance, unless she is guilty of unchastity or other disreputable practices after she leaves that house. (*q*). When property is small separate maintenance may be refused. (*r*). The family property may be so small

Wife or widow when entitled to separate maintenance.

(*k*) Mayne H. L. 6th Edn. p. 593. 8, 9.
(*l*) Madbab Rai *v.* Ganga Bai, 2 Bom., 639.
(*m*) Baisni *v.* Rup Singh, 12 All., 558, 22 C. 418.
(*n*) Nagamma *v.* Virbhadra, 17 Mad., 392.
(*o*) Valu *v.* Ganga, 7 Bom., 84, 17 C. p. 679.
(*p*) Daulta Kuari *v.* Meghu Tewari, 15 All., 382.
(*q*) Raja Perthee Singh *v.* Rani Raj Kooer, 20 W. R. (P. C.) 21. Gokebbai *v.* Lakhmi Das, 14 Bom. 490.
(*r*) Rango Vinayak *v.* Yamunabai, 3 Bom., 48.

that the family cannot bear the strain of supporting the widow in a separate lodging, though it might be able to provide her with food in the family house. In such cases the Court might in its discretion refuse to allow to the widow living apart any larger sum than her maintenance would have cost if she had remained in the family house. (*s*).

Maintenance how far a charge upon the family property.

The maintenance of a Hindu widow is not, until it is fixed and charged on her deceased husband's estate by a decree or by agreement, a charge on such estate which can be enforced against *bonâ fide* purchasers of such estate for value without notice. When the maintenance of a Hindu widow has been expressly charged on her husband's estate, a portion of such estate will be liable to such charge in the hands of the purchaser, even if it be shown that the heirs have retained enough of it to meet such charge; but such estate will not be liable if its transfer has taken place to satisfy a claim for which it is liable under Hindu Law and which under that law takes precedence over a claim for maintenance. (*t*).

Priority of ancestral and family debts.

Such debts have priority over her claim for maintenance. A house being ancestral property of a Hindu family, was sold in execution of a decree by which the decree amount was constituted a charge on such property. The debt sued on had been incurred for the benefit of the family by the co-parceners for the time being, but since the death of such co-parcener's father: *Held* the widow of the latter who resided in the said house during her husband's lifetime was not entitled as against a purchaser for value in good faith under such decree (but with notice that she resided in her husband's lifetime had resided in that house, and still claimed to reside there) to continue to reside for life in such portion of the house sold as she resided subsequent to her husband's death. (*u*).

In the above case Kernan J. remarked : 'If the debt in respect of which the sale took place, was a debt, due by her husband, no doubt could be entertained that she had no such right. Here the finding is, that the debt was incurred by the manager for the benefit of the family. The widow was one of the family, and, though I do not believe her right to maintenance would give her a right to increased

(*s*) Godavaribai *v.* Sagunabai, 22 Bom., 52.

(*t*) Sham Lal *v.* Banna 4 All., 296.

(*u*) Rama Nadan *v.* Rangammal. I. L. R, 12 Mad., 260. (Full Bench), P. R. 39 of 1896.

maintenance by reason of large increase of the property of the manager, still, as the acquisition of the means of providing food and raiment for her as well as for the other members of the family was one of the objects of the manager in carrying on business, I do not see how she can resist effect being given to the manager's act for the family benefit.' (*v*).

Devisee of entire estate.

The devisee of the entire estate of a Hindu testator is liable for the maintenance of the testator's widow, even where the widow has stridhan property in gold and silver and cash given to her by her husband, and there was no express direction in the will about her maintenance. The right to maintenance being one given to a Hindu widow by the Hindu Law, that right cannot be taken away except by express language to that effect. (*w*).

Priority of liability of husband's separate property.

Where a husband under Mitakshara Law dies leaving separate property and also joint property which passes to his co-parceners, the widow's claim to maintenance must be first met out of the separate property, and she cannot come upon the estate till the separate property has proved insufficient. (*x*).

Wife's right to charge the property with her maintenance when property sold by her husband.

Plaintiff's husband sold a plot of land to the defendant. Plaintiff sued to have the property charged with her maintenance. It was found that the plaintiff and her husband lived together, and that the husband had not refused to maintain the plaintiff, and it was not shown that the land was sold for immoral purposes. *Held*, that the property was liable to be sold for her husband's debts, unless incurred for immoral purposes, the burden of proving which lay on the wife, which in the present case she had failed to discharge, and that consequently the suit failed. (*y*).

Widow's right of residence.

There is a distinction in the right of residence possessed by the wife. Katyayan declares ' except his whole estate and his dwelling house, what remains after the food and clothing of his family, a man may give away whatever it be, moveable or immoveable, otherwise it may not be given.' (*z*). The son of a survivor of two brothers sold the dwelling house in part of which the widow of his uncle was living. The

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(*v*) See Supra.
(*w*) Joytara *v.* Ram Hari Sardar I. L. R. 10 Cal., 638.
(*x*) Shib Dayee *v.* Durga Pershad 4 N. W. P., 63.
(*y*) Mussammat Gomti, Chhota Lal and another, P. R. 190 of 1889.
(*z*) 2 Digest 133, 3 Dig. 581.

Court held that she could not be ousted by the purchaser of her nephew's rights. (*a*).

In a suit by a Khatri widow to establish her rights to reside in, and maintenance out of, a house, it appeared that the said house was the only piece of property out of which maintenance could be had, and it had been mortgaged without any reservation or provision for the widow by her two sons for its full value, to raise money for the marriage of one of the sons, and the mortgagee having full knowledge of the widow's claim. *Held,* that the debt incurred by the mortgagors was not of such a kind as to override the widow's rights, and the creditor had no right to eject the widow in satisfaction of his claim (*b*).

Arrears.

Where a Hindu widow sues for maintenance from the family estate of her deceased husband, the allowance of the arrears is a question for the discretion of the Court, and the Court, if it allows arrears of maintenance at all, will not necessarily allow arrears at the same rate as it may allow future maintenance, especially where the plaintiff has made serious delay in bringing her suit for maintenance. (*c*). It is incumbent on the plaintiff to prove a wrongful withholdi of the maintenance to which she is entitled. (*d*).

Declaratory decree.

A merely declaratory decree for maintenance cannc enforced. (*e*).

Future maintenance awarded by a decree when fa due can be recovered in execution of that decree when fa due. (*f*).

Duration of maintenance.

The property given for maintenance is resumable a death of the grantee, the presumption being that the inco. only was granted and not the body of the fund (*g*).

(*a*) Gauri *v.* Chandramani 1 All., 262. Talamand *v.* Rukman 3 All, 353.

(*b*) Jowahir Singh *v.* Mussammat Ram Devi and another, P. R. 112 of 1888.

(*c*) Raghbans Kunwar *v.* Bhugwant Kunwar, 21 All., 183.

(*d*) Malik Arjun Prasad Naidu *v.* Durga Pershad Naidu, I. L. R. XXII M. 326.

(*e*) Veu Kanna *v.* Aitamma, 12 M. 183.

(*f*) Ashutash Bannarji *v.* Lakhemani, 19 C. 139.

(*g*) Katchwain *v.* Sarup Chand, 10 All., 462.

QUESTIONS.

I. What persons are entitled to maintenance?

II. State the nature and extent of the obligation.

III. When is the widow of a deceased co-parcener entitled to maintenance? Under what circumstances is it a charge on ancestral property?

IV. What is the rule as to a wife's maintenance? What would be the effect if she lives separate.? What circumstances justify her claim to separate maintenance?

V. What is the rule as to the amount of maintenance?

VI. What is the effect of unchastity on a wife's or a widow's right to maintenance?

VII. How far have family debts priority over the widow's right to maintenance? What rules of construc- on would govern a Hindu's will as regards the widow's ht of maintenance?

VIII. What is the nature of a wife or a widow's s of residence in the family dwelling house? Is e any distinction between such a right and the right aintenance? State, if any.

IX. What principles guide the Courts in decreeing claim for arrears of maintenance?

X. What is the rule as to the duration of maintenance?

CHAPTER XIV.

PARTITION.

Definition.

The Law of Partition is the aggregate of the rules, which, when a Hindu family, living in union, separates, determines the duties and rights of its several members with respect to the common property and liabilities. (W. and B. 597).

Difference of its signification in the Mitakshra and the Dayabhaga.

In the Mitakshra partition is defined to be the adjustment of divers rights in the whole, by distributing them into particular portions of the aggregate. Partition according to the Dayabhaga is not the severance of joint rights to the whole into separate rights to shares, but is a division of the subject of property amongst those who are already separately entitled to it, but who jointly enjoy it; whose right is already divided into distinct shares in property, which has not, however, been distributed and made in portions, the subject of exclusive appropriation.

Property liable to partition.

Joint Family Property (*a*) and property jointly acquired are liable to partition.

After partition a co-sharer obtains absolute power over the ancestral property.

After partition a member of a joint Hindu family, governed by the Mitakshra Law becomes sole owner of his share in the ancestral property and has the same power of disposal as if it had been acquired property (*b*).

Property not liable to partition.

1. Self-acquired property and gains of science are not liable to partition.

(*a*) For discussion as to what constitutes Joint Family Property, see chapter VII.

(*b*) Madho Pershad *v.* Mehr Ban Singh, I. L. R., XVIII C. 157 (P. C.) followed in Nanak Chand and another v. *Mussammat* Dayan. (P. R., 103 of 1894.)

2. Nuptial gifts to a member of a joint family do not, by reason of the marriage expenses having been defrayed out of the common fund, fall into and form part of the common fund (*c*).

"Whatever is acquired by the coparcener himself without detriment to the father's estate, as a present from a friend or a gift at nuptials, does not appertain to the co-heirs. Nor shall he who recovers hereditary property which had been taken away, give it up to the coparceners, nor what has been gained by science." (*d*).

3. A Raj or a principality is indivisible, the property descends to the eldest son. Zamindaris which are of the nature of Raj follow the same rule. (*e*)

4. Jagir conferred upon some member of a family to preserve his dignity or for services rendered is impartible.

5. Endowments, idols and places of worship are also impartible.

6. A man's self-acquistion is impartible and so is also any property which he has inherited collaterally, or from such a source that the persons claiming a share obtained no interest in it on its devolution to him. (*e*).

Agreement against partition.

An agreement between coparceners never to divide certain property is invalid by Hindu Law, as tending to create a perpetuity, and the parties to the agreement even are not bound by it (*f*).

Direction in a ill against partition.

When a Hindu by his will gives all his property to his sons, but imposes a condition that they should not make a division for a certain period, the restriction is void (*g*).

Minority no bar to partition.

A partition during the minority of one of the co-sharers is not illegal. There is a text of Boudhayan to the effect that the shares of minors together with the

(c) Sheo Gobind *v*. Sham Narain 7 N. W. P., p. 75.
(*d*) Colebrooke's Mit. 1, IV. 1.
(*e*) Mayne's Hindu Law, paras. 468, 467. (6th Edn.)
(*f*) Ramlinga *v* Veruprakashi 7 Bom., 538.
(*g*) Caly Nath Nag *v* Chunder Nath Nag 8 Cal., 378.

interest should be placed under good protection until majority of the owners (*h*). When the minor arrives at full age he may apply to have the division set aside as regards him, if it can be shown to have been illegal or fraudulent, or even if it was made in such an informal manner that there are no means of testing its validity. But a suit cannot be brought by or on behalf of a minor to enforce partition unless on the ground of malversation, or some other circumstance which make it for his interest that his share should be set aside and secured for him (*i*). Plaintiff C. a minor 17 years old at the time of institution of the plaint, sued through his next friend for partition of his share of paternal estate. Although no malversation on the part of the defendant was proved, the Court under the particular circumstances of the case, and with special reference to the plaintiff's age at the time of filing the suit, and to the fact that after attaining his majority he had elected to proceed with the suit, decided that at the date of the suit it was sufficiently clear that it would be in the plaintiff's best interests to order a partition instead of dismissing the suit (*j*).

Who can demand partition.

If the property be ancestral the sons, grandsons and great grandsons acquire an interest in it by birth under the Mitakshra Law and can demand partition. Under the Bengal law the father has got an absolute power of alienation over ancestral property and his sons cannot demand partition against his will as they are not owners by birth. In order to entitle any person to demand partition from his ancestors or coparceners it is necessary that the ancestor next above him has died or does not object to partition. Thus a grandson cannot enforce a partition during the life of a son.—(Mitakshra ch. I. V. v. 3).

On partition the share of a son who has already died descends to his sons.

(*h*) Boudhyayan ii § 2.

(*i*) Mayne's Hindu Law, para. 476. (6th Edn.)

(*j*) Raghobar Dyal *v.* Salig Ram and another, P. R, 104 of 1895.

Any coparcener can sue for partition who is not more than four degrees removed from the last owner, however remote he may have been from the original owner of the property (*k*).

Punjab.

The Punjab Chief Court held in a case of Brahmins of Lahore that a son could not enforce a partition of ancestral immoveable property against his father's consent in his lifetime, nor could he alienate in his father's presence his undivided interest in the family estate (*l*).

Mother's right to partition.

By Hindu law, though a widow is not competent of herself to institute partition proceedings in respect of her deceased husband's property, yet when such proceedings have been commenced by an heir entitled to demand partition and the paternal estate is divided by the sons after their father's death, the widow is entitled for her life to a share equal to that of a son, and it is immaterial whether she is allotted a share as defendant or claims it as a plaintiff. A wife cannot sue for partition during the lifetime of her husband (*m*).

Mode of taking account.

For this purpose it is necessary, first, to deduct all claims against the united family for debts due by it or for charges on account of maintenance, marriages or family ceremonies, which it would have to provide for had it remained united. When these are set aside an account must be taken of the entire family property in the hands of all the different members. In general this account is simply an inquiry into the existing family assets. No charge is to be made against any member of the family because he has received a larger share of the family income than another, provided he has received it for legitimate family purposes (*n*).

(*k*) 10 Bom., P. C, 463, Mayne's Hindu Law, para. 473.

(*l*) Kahu Chand *v.* Sarb Dyal P. R., 109 of 1888, following P. R., 113 of 1886.

(*m*) Mayne, para 477.

(*n*) Do. do.

Illegitimate son.

In the three superior classes, an illegitimate son is not entitled to sue for partition (*o*).

Partition suits.

Ordinarily, a suit cannot lie for partition of a part only of the joint family property. The rule that every partition suit shall embrace all the joint family property has been held to be subject to certain qualifications; as for instance, where different portions of it lie in different jurisdictions, or where a portion of it is not available for actual partition as being in the possession of a mortgagee or is held jointly with strangers to the family (*p*).

Evidence of partition.

To effect a partition coparceners must alter and intend to alter their title to the property. They must cease to become joint owners, and become separate owners. The leading case on the subject is that of Appoovier *versus* Rama Suba in which the Court remarked as follows :—" An actual partition by metes and bounds is not necessary to render a division of the undivided property complete. But when the members of an undivided family agree among themselves, with regard to particular property, that it shall henceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with, and each member has thenceforth in the estate a certain and definite share which he may claim the right to receive and enjoy in severalty, although the property itself has not been actually severed and divided." (*q*).

Previous litigation may be evidence of partition.

Plaintiff sued to recover money due on a bond executed by K. L. deceased, who died in 1884, leaving a widow and two brothers, all three being made defendants in the suit. The First Court decreed the claim against the two brothers who appealed to the Chief Court, contending

(*o*) Mayne §. 475.

(*p*) Hari Das *v.* Prannath I. L. R. 12 Cal., 566, P. R, 77 of 1887. Mayne para. 493, I. L. R., 3 B 497.

(*q*) 8 W. R., 1 (P. C.)

that they and the deceased formed a joint Hindu family, and that they consequently took the whole property by survivorship and were therefore not liable for the present debt of the deceased. *Held*, after inquiry upon remand that the previous litigation which had taken place between the parties effected such a separation of interest as to have destroyed the jointness of the estate according to the principle enunciated in Appoovier's case. (*r*) This ruling was followed by the Chief Court in Nanak Chand and another *versus Mussammat* Dayan in which the Court remarked: "It is not necessary to show that the property itself has been actually severed or divided ; a division of the right and title is sufficient without an actual partition of the property by metes and bounds. The test is the intention to be inferred from the acts done and the instruments executed by the parties themselves, and the Court must find in each particular case whether the parties have agreed that the property in question shall henceforth be the subject of ownership in defined shares and have taken away from it the character of undivided property and joint enjoyment."(*s*)

Rebuttal of presumption.

The presumption raised by law from the natural state of families, in favor of union, may be destroyed by evidence of separate acts inferring a contrary one, and amounting to partition having taken place. Such are for this purpose separate religious rites and ceremonies; living and dining apart ; transactions inconsistent with their idea of continuing united, as making mutual loans, sales, purchases, and other contracts, or suits by the members against one another; separate records of ownership ; the opinion of the neighbourhood as indicated by separate payments of village or other dues to members of the family (*t*).

Extent of presumption

The presumption of union in a Hindu family is stronger as between brothers than as between cousins, and the farther you go from the founder of the family, the presumption becomes weaker and weaker. (*u*)

(*r*) Bishen Singh and Autar Singh *v.* Kishan Chand P. R., 2 of 1892.

(*s*) P. R., 103 of 1894.

(*t*) Strange's Hindu Law, 217.

(*u*) Moro Vishvanath *v.* Gonesh Vithal 10 Bom., H. C., 444, 468.

Effect of sale being concluded in the name of a single member.

Where it is either admitted or proved that the family of the parties is joint, the legal presumption as to all their acquisitions being joint, is not rebutted by the fact that the disputed property was purchased in the name of a single member, or that he was allowed to have his name registered on the Collector's books, or that he carried on a litigation with respect to it as owner. (*v*)

QUESTIONS.

I. Define partition. What is the difference between the Mitakshra and the Dayabhaga view on the point ?

II. What property is liable to partition ? What effect has partition over a co-sharer's power of disposal as regards property originally ancestral ?

III. What property is not liable to partition ?

IV. Is an agreement between co-parceners never to divide property valid ? What is the effect of a provision in a will restricting partition between the legates ?

V. Is minority a bar to a claim for partition ? Under what circumstances Courts would sanction a partition on behalf of a minor ?

VI. Who can demand a partition ? What is the Punjab view as regards the son's power to enforce partition of ancestral property against his father's consent ?

VII. What mode is adopted in taking accounts on partition between co-sharers ?

VIII. What property a suit for partition should include ?

IX. What test would you apply to determine that a partition has or has not taken place ? How far previous litigation between joint owners affects the question?

X. How may the ordinary presumption as to jointness in a Hindu family be rebutted ?

XI. What is the effect of a sale being concluded in the name of a single member of the family?

(*v*) Dhan Das Panday *v Mussammat.* Shama Sundri, 1. P. C. R., 147.

CHAPTER XV.

LAW OF INHERITANCE.

PRINCIPLES OF SUCCESSION IN CASE OF MALES.

Inheritance assumes separate property.

So long as the Joint Family continued in its original purity, its property passed into the hands of successive owners, but no recipient was in any sense the heir of the previous possessor. It is only in cases when the property was held in absolute severalty by the last male owner that the Law of Inheritance, properly so called applies. The heir of such person is the person who is entitled to the property, whether he takes it at once, or after the interposition of another estate. If the next heir to the property of a male is himself a male, he becomes the head of the property and holds the property in severalty or coparcenary as the case may be. At his death the devolution of the property is traced from him. Not so in the case of females. If the property of a male descends to a female, she does not become a fresh stock of descent. At her death it passes not to her heirs but to the heirs of the last male holder. And if that heir is also a female, at her death, it reverts again to the heir of the same male, until it ultimately falls upon a male who can himself become the starting point for a fresh line of inheritance. (*a*)

Succession never in abeyance.

The right of succession under Hindu law is vested immediately on the death of the owner of the property. It can not remain in abeyance in expectation of the birth of a preferable heir, not conceived at the time of the owner's death. A child in his mother's womb, is, in contemplation of law, considered to be actually existing, and will, on his birth, devest the estate of any person with a title inferior to his own, who has taken in the meantime.

(*a*) Mayne on Hindu Law, 6th Edn. § 498.

So, under certain circumstances, will a son who is adopted after the death. There are no other cases in which an estate will be devested after it has once vested. (*b*)

Principle of religious efficacy.

The succession of one to the estate of another on the sole ground of his capacity to offer funeral cakes is called the principle of religious efficacy. This principle while universally true in Bengal is by no means such an infallible guide eleswhere.

The terms Sapinda, Sakulya and Samanodaka.

In order the better to understand these terms it is necessary to consider the religious offerings required of a Hindu to his ancestors. A Hindu may present three distinct sorts of offerings to his deceased ancestors; either the entire funeral cake, which is called an undivided oblation, or the fragments of that cake which remain on his hands and are wiped off it, which is called a divided oblation, or a mere oblation of water. The entire cake is offered to three immediate paternal ancestors, *i.e.*, father, grandfather and great-grandfather. The wipings or *lepa* are offered to the three paternal ancestors next above those who receive the cake, *i. e.*, the persons who stand to him in the 4th, 5th, and 6th degree of remoteness. The libations of water are offered to paternal ancestors ranging seven degrees beyond those who receive the *lepa*, or fourteen degrees in all from the offerer; some say as far as the family name can be traced. The general term *Sapinda* is sometimes applied to the offerer and his six immediate ancestors, as he and all of these are connected by the same cake, or *pinda*. But it is more usual to limit the term *Saphinda* to the offerer and the three who receive the entire cake. He is called the *Sakulya* of those to whom he offers the fragments, and the *Samonodaka* of those to whom he presents mere libations of water. (*c*)

Religious principle not the rule of the Mitakshra.

The claims of rival heirs according to Bengal authorities are tested by the number and nature of their respective offerings. The Mitakshra never alludes to such a test. No doubt the distinction between *Sapindas* and *Somonadakas* is referred to and it is stated that the former succeed before the latter, and that the former offer the funeral cake, while the latter offer obla-

(*b*) Mayne on Hindu Law § 449.
(*c*) Do. 601.

tions of water only. But this distinction is stated, not as evidencing different degrees of religious merit, but as marking different degrees of propinquity. The claims of rival heirs are determined by the latter test not by the former. (*d*)

Meaning of Sapinda according to the Mitakshra.

Mitakshra defines *Sapinda* relationship without any reference to religious rites. The author Vigyaneshwar says "*Sapinda* relationship arises between two people through their being connected by particles of the one body." Hence a man is the *Sapinda* of his paternal and maternal ancestors, and his paternal and maternal uncles and aunts. The following conclusion is arrived at by Messrs. West and Buhler. "1. Vijnyaneshwara supposes the *Sapinda* relationship to be based, not on the presentation of funeral oblations, but on descent from a common ancestor, and, in the case of females also on marriage with descendants from a common ancestor. 2. that all blood relations within six degrees, together with the wives of the males amongst them, are *Sapinda* relations to each other. (*e*) The Bandhus are relations within the 6th degree who belong to a different family." (*f*)

Agnates exclude cognates.

The Bandhus, or relations through a female, never take until the direct male line, down to and including the last *samonadaka*, has been exhausted. The governing idea in the mind of the author of Mitakshra was that propinquity and not religious merit was the test of heirship. (*g*)

Bandhus or "Cognates."

Cognates are of three kinds; related to the person himself, to his father, or to his mother as declared by the following text:—'The sons of his own father's sister, the sons of his own mother's sister and the sons of his maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle must be deemed his father's cognate kindred.

(*d*) Mayne on Hindu Law, 6th Edn. § 509.
(*e*) W. and B. 122. Mayne do. 511.
(*f*) W. and B. 136, 489.
(*g*) Mayne on Hindu Law § 512.

The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncles, must be reckoned his mother's cognate kindred. The cognate kindred of the deceased himself are his successors in the first instance; on failure of them, his father's cognate kindred, or, if there be none, his mother's cognate kindred.' (*h*)

Religious duty the result not the cause of inheritance.

Mr. Colebrooke says "It is not a maxim of the law that he who performs the obsequies is heir, but that he who succeeds to the propery must perform them." (*i*)

Great grandson the last direct heir.

Great grandson is the last direct heir. Manu says "For three is the funeral cake ordained. The fourth is the giver. But the fifth has no concern. To the nearest after him in the third degree the inheritance belongs." (*j*)

Punjab.

In the Punjab, and among the Sikhs and Jains, the rules of descent appear to be in the main those of the Mitakshra, but the doctrine of religious efficacy is wholly unknown.

QUESTIONS.

(1) In what cases only does the law of Inheritance apply?

(2) What would be the rule in the matter of succession if the last holder of the property were a female?

(3) Is succession ever in abeyence under Hindu Law? Explain the case of a child in the mother's womb or a son adopted after death,

(4) What do you understand by the principle of religious efficacy?

(5) Explain the terms Sapinda, Sakulya and Samanodaka. In what sense does Mitakshra use the term Sapinda?

(6) What test determines the order of succession according to Mitakshra?

(7) Who are cognates? Describe the several classes of cognates and their order of precedence.

(8) What rules of descent in the main prevail in the Punjab and among Sikhs and Jains?

(*h*) Amrita v. Lakhi Narayan 10 W. R. (F. B.) 76.
(*i*) Stra H. L. 242.
(*j*) Manu IX 187.

CHAPTER XVI.

PRINCIPLES OF SUCCESSION IN THE CASE OF FEMALES.

Early position of women.

Women originally had no rights. They were to be always in a state of dependence. "The father protects a woman in her childhood, the husband during her youth, the son in old age; a woman has no right to independence." (Manu IX § 3)

Growth of their right to property.

The same causes, which led to the break up of the family union, would introduce women to the possession of the family property. At the time of partition the fund out of which they were to be maintained would be split up into fragments. The natural course would be, either to give an extra share to any member of the family who would himself be responsible for their support, or to allot to them shares out of which they could maintain themselves. This appears to have been what actually took place. Similarly, upon the death without issue of a male owner who was the last survivor of the co-parcenary, or who had been separated from the other members, or whose property had been self-acquired, it would be more natural that his property should remain in the possession of the women of the family for their support, than that they should be handed over with the property to distant members of the family, who might be utter strangers. In this way their right as heirs, properly so called, and not merely as sharers, would arise. But that right would not extend beyond the reason for it, *viz.*, their claim to a personal maintenance. The woman does not become a new stock of descent and where she inherits from male, his heirs and not hers take at her death. (*a*)

The women who are the actual members of a man's family, and as such entitled to support, are the daughter, the mother, wife or sister, taking in under these terms more distant relations of the same class such as the grandmother and the like.

(*a*) Mayne on H. L. 6th Edn. § 518,

Right of daughter.

A daughter who was formerly appointed to raise up a son for her father would naturally become the member of the family and become an heir. The text of Manu which states her rights of inheritance follows after three texts which relate to the appointed daughter solely. It then proceeds " The son of a man is even as himself and as is the son such is the daughter (thus appointed). How then (if he have no son) can any inherit his property but a daughter who is closely united with his own soul." The words in bracket are the gloss of Kalluka Bhutta. (b)

Grounds of precedence between daughters.

Benares Law.

The daughter's right of inheritance arose from the obligation to endow her. Parasara says, " The unmarried daughter shall take the inheritance of the deceased, who left no male issue, and on the failure of her, the married daughter." (c)

Right of Mother.

The mother as well as the grandmother and great-grandmother, are certainly *Sapindas*, as sharing, with their husbands, the cakes which are offered to them by the male issue. But her claim and that of the father too is always placed on the ground of consanguinity, and of the merit she possesses in reference to her son, from having conceived and nurtured him in her womb. (d)

Right of widow.

The widow was entitled to be maintained by her husband's heirs from the very earliest times. The next step was that the amount necessary for her maintenance was set apart for it, and left at her own disposal.

She is heir but not coparcener.

According to Mitakshra the widow is entitled to inherit to her husband, if he died separate and not reunited and leaving no male issue, and the rule is adopted universally. The rule seems to follow from the view taken by the Mitakshra of the rights of undivided members. While the husband lived, his wife had only a right to be maintained by him in a suitable manner; after his death, his right all lapse to his surviving coparceners, and she can have no higher right against them than she had against her husband. The question of heirship for the first time arises in the case of a divided member, as it is only in regard to divided property that there can

(b) Mayne on H. L. 6th Edn. § 519.
(c) 3 Dig 490.
(d) Mayne on H. L. 6th Edn. § 521.

be an heir, properly so called. In other words, the widow can take by succession as heir, but cannot take by survivorship as co-parcener. (*e*) But even in the case of undivided family she takes the self-acquired property of her husband. She only is heir to her husband, that is, to the property which was actually vested in him either in title or in possession at the time of his death. (*f*)

Sister.

Sister is considered a Sapinda in Western India by virtue of her affinity to her brother. She is also considered a *gotraja Sapinda*, on the ground that this term is satisfied by her having been born in her brother's family, and that she does not lose her position as a *gotraja* by being born again in her husband's *gotra*, upon her marriage. That being so her place among the *gotrasjas* is determined by nearness of kin, and is settled to be between the grandmother and the grandfather. In Bengal she is not an heir, nor under Benaras Law (*g*). Under Benaras Law a sister's son comes in as a Bandhu after the last of the Samanodakas but he takes by his own independent merit, not through her (*h*). In Madras her claim as heir has been recognized (*i*) though the claim of a sister's son has been held to be superior (*j*).

Bhinnagotra Sapinda.

The term Bhinnagotra Sapinda as used by Vijnaneshwara, meant no more than a person connected by consanguinity, but belonging to a different family, either by birth or by marriage. The Madras High Court seemed disposed to doubt whether the Mitakshra had accepted the doctrine that females could only inherit under an express text, and the learned judges appeared to accept the authority of *Sancha* and *Lichita* of supplying such a text if one were necessary. The text is "The daughter shall take the female property, and

(*e*) Mayne on H. L. 6th Edn. § 526.

(*f*) Do. do. 528.

(*g*) Jagat Narain *v.* Sheo Das 5 All., 311.

(*h*) Chilikani *v.* Suraneni 6. Mad., H. C. 288, See also I. L. R., 15 Mad., 422.

(*i*) Kuth Ammal *v.* Radha Krishma 8 Mad., H. C. 88.

(*j*) Lakhshman Mal *v.* Tiruvoogada Mudali I. L. R., 5 M. 241.

she alone is heir to the wealth of her mother's son, who leaves no male issue (*k*) According to Mr. Mayne such a view is thoroughly intelligible and arguable and is probably the line that would be followed with most chance of success if the case came before the final court of appeal. On this principle the Madras High Court have held that a father's and a son's daughter, a daughter's daughter, were with in the line of possible heirs under the Mitakshra, although they would be postponed to male heirs more remotely connected with the deceased owner. (*l*)

QUESTIONS.

(1) What was the early position of women according to Hindu Law?

(2) How did they subsequently acquire rights as heirs?

(3) What women are entitled to support and claim as heirs?

(4) What ground of precedence is there among several classes of daughters?

(5) What is the nature of a widow's and a mother's right ?

(6) Is sister recognized as an heir according to any school of Hindu Law. If so, name it?

(7) What are Bhinna-Gotra Sapindas and what text favors their right?

(8) What other females have been held to come under the rule?

(*k*) 3 Digest 187.

(*l*) I. L. R., 13 M. 10, 14 M. 149, 15 M. 421, 18 M. 193, 21 M. 263. Mayne on H. L. 6th Edn. § 539.

CHAPTER XVII.

Inheritance.

The whole Hindu Law of Inheritance may be said in fact to be based upon the two following texts of *Yajnavalkya* :—

"Among these (twelve sons) the next in order is heir, and presents funeral oblations on failure of the preceding."—*Yajnavalkya II*, 135.

This shows that sons principal and secondary take the inheritance in the first instance. The order of succession among all *tribes and classes* on failure of them is next declared.

"The wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles (*gotrajas*), cognates (*bandhus*), a pupil, and a fellow-student. On failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven leaving no male issue."—*Yajnavalkya II*, 136-37.

The whole Hindu Law of Inheritance, therefore, is in a nut-shell. The enumeration and the classification of heirs given by *Yajnavalkya* form the basis of the Hindu Law of Inheritance. But the texts of *Yajnavalkya* do not give an exhaustive enumeration of heirs. They merely declare the different *classes* of heirs who are entitled to succeed, and determine their *order of succession.*

Each preceding class of heirs must be thoroughly exhausted before we come to seek for heirs of the next class. The first class of heirs is the sons and the last the fellow-students. The king is not mentioned as an heir by *Yajnavalkya* (though he is mentioned by Manu).(*a*)

We have thus ten classes of heirs:—

1. Sons.
2. Widows.

(*a*) Tagore Law Lectures for 1880, by Rajkumar Sarbadhikari, pp. 563-65 and p. 313. See also p. 588 and Girdhari Lal Roy *v.* The Government of Bengal, 10 W. R., (P. C.) 3133.

3. Daughters, including their sons.
4. Parents.
5. Brothers.
6. Sons of brothers.
7. Gotrajas (gentiles).
8. Bandhus (cognates).
9. Pupils.
10. Fellow-students.

Number and priority determined by commentators and text writers.

The distinctive marks of each class of heirs are unmistakable. We can easily distinguish one from the other. It remains now to define the different classes in such a manner as to fully bring out *all* the heirs contained in each class. The labours of the commentators and the text-writers of the different schools have been addressed to the determination of the number and priority of heirs comprised in each class.

Benares School.

The doctrines of the Benares School, represented by the *Mitakshara*, may be stated as below:—'Consanguineous relation' to the deceased determines the number of the different heirs in each class and the 'nearness of each heir to the deceased determines his priority among the other heirs in that class. In other words, consanguinity determines the *heritable* right, and propinquity the *preferable* right of a kinsman. (*b*)

Propinquity.

The Rule of Propinquity is founded on the following text of *Manu*, *Chapter IX*, 187 :—

"To the nearest *Sapinda* the inheritance next belongs." The whole Hindu Law of Inheritance may very properly be said to depend upon a correct rendering of this passage. There are two important propositions derived from the text of Manu:—

1. The property of a deceased proprietor belongs to his nearest *Sapinda*.

2. The deceased and his heir must be related to each other as *Sapindas*. (*c*)

(*b*) Tagore Law Lectures for 1880, by Rajkumar Sarbadhikari, pp. 566—67.
(*c*) Do., 570.

Principle of propinquity how far applicable.

This principle of propinquity determines the order of succession not only among *Sapindas* but also among the other classes of kinsmen. It is a general rule and is universally applicable. The Samanodakas and Bandhus also come within the operation of this rule. It is according to Vignyaneshvara and all other Hindu jurists the 'governing principal' in the law of succession, and should, therefore, be applied to the solution of every question of preference among heirs. It does not matter to what class of heirs the claimants belong.

Meaning of the term Propinquity.

But what is propinquity ? 'It is nearness of blood' declare the jurists of the Benares School.

" Propinquity chiefly depends," says Visvesvara Bhatta, "upon an abundance of corporal particles." Of two persons one is nearer to the deceased than the other, if he has a larger number of common corporal particles in his body. Take the case of the brother and nephew for instance. The deceased, the brother and the nephew are all descended from a common ancestor, the father of the deceased. All of them possess in their bodies corporal particles belonging to the father of the deceased. But the brother possesses a larger number of these particles than the nephew. The former is, therefore, nearer to the deceased than the latter. Both the son and the grandson are descended from the deceased. Both of them have in their bodies corporal particles belonging to the deceased. But the son possesses a larger number of these particles than the grandson. The son is. therefore, nearer to the deceased than the grandson. (*d*)

Nearest degree of kindred to the deceased.

By the term propinquity is meant nothing more nor less than " the nearest degree of kindred to the deceased." He who stands in the nearest degree of kindred to the deceased is preferred to one who stands in a remote degree of kindred to him (*e*)

But in order to define and make the meaning more clear the *Mitakshara* lays down—The nearer line excludes a remoter line. The descendants of the deceased himself, for instance, would exclude the father's line.

(*d*) T. L. L., by Rajkumar Sarbadhikari, p. (571—73).
(*e*) Do., 574.

" On failure of the father's descendants the line of the grandfather is entitled to inherit. On failure of the latter the descendants of the great grandfather come in as heirs. In this manner up to the seventh generation should be understood the succession of kindred belonging to the same general family and known as Sapindas. (*f*)

When the heirs are known the principle of propinquity determines the *order* of succession according to *Mitakshara* among them. (*g*)

Order of succession.

The order of succession, as given by Mr. Mayne, is as below :—

1. First a man's male issue: his sons, grandsons, and great grandsons.
2. His widow.
3. Daughter and her sons.
4. Parents.
5. Brothers.
6. Their male issue.
7. Remote kindred in descending and ascending line to the 14th degree.
8. Bandhus or Cognates.
9. Strangers.
10. The king. (*h*)

Issue.

If a man has become divided from his sons and subsequently has one or more sons born he or they take the property exclusively. If he is undivided from them, his property passes to the whole of his male issue which includes his legitimate sons, grandsons, and great grandsons. The general rule by which the nearer exclude the more remote does not apply here. For all of them have according to *Mitakshara* equal rights by birth. All of these take at once as a single heir, either directly or by way of representation. (*i*)

Primogeniture.

The rule of primogeniture applies only in the case of impartible Raj or ancient Zamindaris. According to this doctrine the property passes to only one of the male issue, generally the eldest; and by the term eldest is meant the

(*f*) Mitakshara II, 5, 4, 5, and T. L. L. for 1880, pp. 575.
(*g*) T. L. L. for 1880, p 583.
(*h*) Mayne on H. L., 6th Edn., Chap. XVIII.
(*i*) Do., § 540.

person who was born first not the first-born son of a senior wife. So long as the line of the eldest son continued in possession, the estate would pass on in that line. That is to say on the death of an eldest son, leaving sons, it would pass on to his eldest son and not to his brother. Under this there is no principle of representation or survivorship, and upon the line of the eldest son becoming extinct, the heir must be sought among the male co-parceners, and amongst these the person who was nearest the last male holder was the heir. (*j*).

Illegitimate sons.

Illegitimate sons in the three higher classes never take as heirs, but are only entitled to maintenance. The illegitimate sons of a Sudra may, however, under certain circumstances, inherit either jointly or solely. (*k*)

Share of illegitimate son.

He takes half a share, that is, half as much, as the amount of one brother's allotment. (*l*)

Widows.

In default of male issue, joint with, or separate from, their father, the next heir is the widow. Where there are several widows all inherit jointly. All the wives take together as a single heir with survivorship, and no part of the husband's property passes to any more distant relation till all are dead. (*m*)

Several widows.

The widows may be placed in possession of separate portions of the property, either by agreement among themselves, or by decree of Court, where such a separate possession is desirable. But no partition effected between them would convert the joint estate into an estate in severalty, and put an end to the right of survivorship. A widow can, however, alienate her life-interest as against her co-widows, just as she can against the reversioners, and such an alienation can be enforced by partition against them without prejudice to their rights of survivorship. (*n*)

Affect of want chastity.

Chastity is a condition precedent to the taking by the widow of her husband's estate. But according to

(*j*) Mayne on H. L. §§ 541, 542, 6th Edn.
(*k*) Do., § 547.
(*l*) Do., § 550.
(*m*) Bhagwan Deen *v.* Myna Bai, 9 Suth. W. R. (P. C.) 23.
(*n*) Janki Nath *v.* Mathura Nath, (F. B.) 9 Cal., 580.

later authorities when once she has become entitled to it in possession her right to it can not be defeated by subsequent unchastity.(*o*)

Second Marriage.

The second marriage of a widow was formerly unlawful, except where it was sanctioned by local custom, and it entailed the forfeiture of a widow's estate, either as being a signal instance of incontinence or as necessarily involving degradation from caste.

The marriage of widows is now legalized in all cases. But the Act which permits it, *i e.*, Section 2 of Act XV of 1856 provides, "All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband, or to his lineal descendants, or by virtue of any will or testamentary provision conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then died, and the next heirs of the husband or other persons entitled to the property on her death shall thereupon inherit to the same." This section it has been held operates only as a forfeiture of existing rights and creates no disability to take future interests in the family of the widow's late husband. Therefore that she may succeed to the estate of her son by a first marriage who had died subsequent to her second marriage. Her conversion to Mohammedanism and then contracting a second marriage would equally entail forfeiture of her present rights.(*p*) Act XV of 1856 does not apply to cases where the widows according to the custom of their caste are allowed to re-marry.(*q*)

Right of guardianship.

The Allahabad High Court has held that a widow re-marrying forfeits her right to the guardianship of her minor children, under Act XV of 1856, in the absence of an express appointment by the late husband.(*r*)

Daughter.

The daughter comes next to the widow taking after her, or in default of her, except whereby some special local or family customs she is excluded.

(*o*) P. R. 76 of 1901, I. L. R., 5 C. 776.
(*p*) Mulangini Gupta *v.* Ram Rattan Roy, 19 C. 289 (F. B.)
(*q*) 19 C. 292, 293, 295, P.R. 46 of 1891, P.R., 115 of 1900, XXII, B 321.
(*r*) Khushali *v.* Rani 4 All., 195.

She is under the same obligation to chastity as a widow. Therefore incontinence will prevent her taking the estate but will not deprive her of it if she had once taken it.

Only inherits to her own father.

A daughter inherits only to her own father. The daughter of the brother, the uncle, or the nephew is not heir, except in Bombay where they are considered as *gotraja sapindas*, and come in as distant kindred.(*s*)

Except in Bombay.

Precedence.

According to Benares School a maiden daughter is in the first instance entitled to property; failing her, the succession devolves on the married daughters who are indigent, to the exclusion of the wealthy daughters; and in default of indigent daughters, the wealthy daughters are competent to inherit; but no preference is given to a daughter who has, or is likely to have, male issue over a daughter who is barren or a childless widow. The Bengal Law is a little different, so also *Mithala* and that of the *Smriti Chandrika.*(*t*)

Several daughters.

Where daughters of the same class exist they all take jointly in the same manner as widows with survivorship. If they choose they can divide the estate for the purpose of separate enjoyment and they can not thereby create estates of severalty which would be alienable or descendable in a different manner.(*u*)

Daughter's son.

Though a *sapinda* is not a *gotraja sapinda.* But the same reasons which classed the daughter as a nearer heir bring in her son also. He was at one time reckoned amongst the subsidiary sons and his status was that of a son. The practice of appointing daughters to raise up issue is now obsolete, but the place assigned to her and her son in the order of succession remains still the same.(*v*)

He succeeds after all daughters.

A daughter's son can never succeed to the estate of his grandfather, so long as there is in existence any daughter who is entitled to take either as heir or by survivorship to her other sisters. The reason is that he takes, not as heir to any daughter who may have died, but as heir to his own grand-father, and, of course, can not take at all so long as there is a nearer heir in existence. Sons by different daughters all take *per*

(*s*) Mayne on H. L., 6th Edn., § 557.
(*t*) Do. do., 558.
(*u*) Do. do., 559.
(*v*) Do. do., 562.

Takes *per capita.*

capita and not *per stirpes*; that is to say, if there are two daughters, one of whom has three sons and the other has four sons, on the death of the first daughter, the whole property passes to the second, and on her death, it passes to the seven sons in equal shares. (*w*)

Is full owner.

A daughter's son takes as full owner and becomes a new stock of descent, and on his death the succession passes to his heir and not back again to the heir of his grandfather.

Has no vested interest.

But until the death of the last daughter capable of being an heiress, he takes no interest whatever, and therefore can transmit none. Therefore if he die before the last daughter and leave a son, that son will not succeed because he belongs to a complete different family, and he would offer no oblation to the maternal grandfather of his own father. (*x*)

Daughter's daughter.

Daughter's daughter also would not succeed except in Bombay and by very recent decisions in Madras. (*y*)

Parents.

The line of descent being exhausted the next heirs are the parents. The *Mitakshara* gives the preference to the mother on the ground of propinquity and this is stated to be the law in Mithila and Bombay. In Bengal father takes precedence. In Guzerat the father is preferred to the mother on the authority of *Mayukha.* (*z*)

Step-mother.

A step-mother is excluded in Bengal and in *Mitakshara.* (*a*)

The same rule *a fortiori* applies to higher ascendants, such as a grand-mother. (*a*)

Unchastity.

Unchastity of a mother will prevent the estate vesting in her according to the Bengal High Court. (*b*) In Bombay and Madras it has been decided that the condition as to chastity only applies to a widow, and the inclination of the High Court, N. W. P., seems to be in the same direction. (*c*) But her subsequent unchastity will not divest an estate which she has once taken. (*d*) Since Act XV of 1856 a mother will not lose her rights as heiress to her son, by reason of a second marriage previous to his death.

Brothers.

Next to parents come brothers.

(*w*) Mayne on H. L, 6th Edn., § 563.
(*x*) Do., 564.
(*y*) See foot-note (*l*) page 112 of this book.
(*z*) Mayne on H. L., § 565, 6 B. 541.
(*a*) Do., 566 and Rama Nand *v.* Surgiani, 16 All., 221.
(*b*) Ram Nath *v.* Durga, 4 Cal., 550.
(*c*) Advyapa *v.* Rudrava, 4 B 104, Kojyadu *v.* Lakshmi, 5 Mad., 149. Deoki *v.* Sukhdeo 2 N. W. P. p. 363.
(*d*) I. L. R., 5 C 776.

Among brothers those of the whole-blood succeed before those of the half-blood. If there are no brothers of the whole-blood, then those of the half-blood are entitled according to the law of Benares and Bengal, and that which prevails in those parts of the Bombay Presidency which follow the *Mitakshara*. Whole before half-blood.

The *Mayukha*, however, prefers nephews of the whole to brothers of the half-blood; and its authority is paramount in Gujrat and the island of Bombay.

Where no preference exists on the ground of blood, an undivided brother always takes to the exclusion of a divided brother, whether the former has re-united with the deceased, or has never severed his union. Illegitimate brothers may succeed to each other.(*e*) Undivided before divided.

In the Punjab in the case of collateral succession, in a contest between relations of the whole-blood and those of the half-blood, the Court may presume, until the contrary is proved, that— Punjab.

(*a*) when the property of the common ancestor was distributed according to the rule of *chundawand* (*per stirpes*), the whole-blood excludes the half-blood, and

(*b*) where the property of the common ancestor was distributed according to the rule of *Pagwand* (*per capita*), the whole-blood and half-blood succeed together.(*f*)

In default of all brothers, of the whole or half-blood, the sons of brothers or nephews succeed. To this *Mayukha* has made an exception as has already been pointed out. But according to the Benares and Bengal schools no nephew can succeed as long as there is any brother capable of taking. The universal rule is that except in the case of a man's own male issue the nearer *sapinda* always excludes the more remote. But if a brother has once inherited to his brother, and then dies leaving sons, they will take along with the other brothers, because an interest in the estate Nephews.

(*e*) Mayne on H. L., 6th Edn., § 567.
(*f*) Rattigan's Digest of Customary Law, para. 26.

had actually vested in their own father, and that interest passes unto them as his heirs. But it must be remembered that the brother must live until the estate has actually vested in him. That is, he must not only survive his own brother, but survive any other persons such as the widow, daughter, mother, &c., who would take before him.

There is the same order of precedence between sons of brothers of whole and half-blood and between divided and united nephews, as prevails between brothers.(*g*)

Take *per capita*.

Where nephews succeed as the issue of a brother on whom the property has actually devolved, they, of course, take his share, that is, they take *per stirpes* with their uncles, if any. For instance, suppose at a man's death he leaves two brothers, *A* and *B*, of whom *A* has two sons, and immediately after *A* dies; then, as the estate had already vested in *A*, his sons take half, and *B* takes the other half. But when the succession devolves on the brother's sons alone as nephews, they take *per capita* as daughters' sons do.

Nephew has not a vested interest.

A nephew has not a vested interest by birth. He can only take if he is alive at the time the succession opens. A nephew subsequently born will neither take a share with nephews who have already succeeded nor will the inheritance taken by others to whom he would have been preferred if then alive, be taken from them for his benefit. But if on any subsequent descent he should happen to be the nearest heir, it will be no impediment to his succession that he was born after the death of the uncle to whose property he lays claim.(*h*)

Grand nephew.

The brothers' grandson, or grand nephew, is not mentioned by the *Mitakshara*, unless he may be included in the term brothers' sons. He is, however, expressly mentioned by the Bengal text-books as coming next to the nephew, and is evidently entitled as a *sapinda*, since he offers an oblation to the father of the deceased owner. On the same principle, the brother's great grandson is excluded as a *sapinda*, though he comes in

(*g*) Mayne on H. L., 6th Edn., § 569.
(*h*) Ditto, 570.

later as a *sakulya.* The same distinction as to whole and half-blood prevails as in the case of brothers, of course he can not succeed so long as any nephew is alive, except by special custom.

In Western India the grand nephew has been decided to be an heir, though his position is not exactly defined.(*i*) In Madras it has been held upon a very full discussion of the authorities, that the word 'sons' in *Mitakshara* II, 4 § 7 and II, 5, 1, does not include grandsons, and that the son of the paternal uncle succeeds before a brother's grandson.(*j*)

Grand-fathers and great-grand-fathers' line.

On the exhaustion of the male descendants in the line of the owner's father, a similar course is adopted with regard to the line of his grand-father and great-grand-father. In each case, according to the *Mitakshara*, the grand-mother and great-grand-mother take before the father and great-grand-father. Then come their issue to the third degree inclusive. That is to say, so far as the issue of each ancestor are his *sapindas*, they are also the *sapindas* of the owner, with whom they are connected through the ancestor.

Whole and half-blood.

In these more distant relationships, the High Court of Bombay holds that there is no preference of whole-blood over half-blood, in cases governed by the *Mitakshara* and the *Mayukha.* Priority on this ground is limited to the cases of brothers and their issue.(*k*) A Full Bench of the Allahabad High Court has arrived at an opposite conclusion.(*l*)

Sakulyas and Samonodaks.

All the *gotraja sapindas* of the nearest class, being exhausted, the *sakulya*, or persons connected by divided oblations, and *samonodakas* kindred connected by libations of water next take the inheritance. The former extend to three degrees, both in ascent and descent, beyond the *sapindas*, and the latter to seven degrees beyond the *sakulyas* or even farther, so long as

(*i*) W. and B. 480.
(*j*) Suraya Bhakta *v.* Lakhmi Narasamma, 5 M. 291. Mayne on H. L., §. 571.
(*k*) Sammit *v.* Amra, 6 Bom. 394; see also P. R. 83 of 1894.
(*l*) Suba Singh *v.* Surfaraz Kunwar, 19 All. 215.

the pedigree can be traced. The *Mitakshara*, after exhausting the nearest *sapindas*, says :—'In this manner must be understood the succession of kindred belonging to the same general family and connected by funeral oblations (*somanagotra*, *sapindas*, *sakulyas*). If there be none such, the succession devolves on kindred connected by libateous of water *somanadaks*.(*m*)

Bandhus.

After all the *somanadaks* are exhausted, the *bandhus* succeed according to Benares, and Mithila law.(*n*) According to the Bengal School of Hindu Law the *bandhus* or cognate *sapindas* come in next after all the agnatic *sapindas* are exhausted, and before resort is had to the agnatic *sakulyas*.(*o*)

Sister's son.

There has been a struggle for existence for the sister's son. His right has always been recognized under the Dayabhuga in Bengal. His right under the *Mitakshara* law was denied by the Privy Council.(*p*) But in this case Council claimed for him a status as *gotraja sapinda* and disclaimed for any status as a *bandhu*. But the Privy Council, in the next following year 1868, held that the list of *bandhus*, given in the *Mitakshara*, was not exhaustive, and admitted the claim of maternal uncle instead of allowing the property to go to the Crown by escheat.(*q*) In this case the uncle took as heir to the sister's son which is a converse case. The case of Makvorain *v.* Mohan was not referred to. The Full Bench of the High Court of Bengal, including Mr. Justice Romesh Chander Mitter, recognized his claim.(*r*) The question was held to be an open one by the Privy Council in 1871.(*s*) In Bombay, however, sisters are heirs to their brothers. *Mayukha* favors their right next in order after the paternal grandmother. The Privy Council upheld their right in priority to nephews according to Hindu law prevailing in Bombay.(*t*) A

(*m*) Mitaksha a 11, 5 § 5. 6 note.
(*n*) See page 107 of this book.
(*o*) Deponlar Rai *v* Moti Lal, I. L. R. 9 Cal., F. B., 563.
(*p*) Thakvorain *v* Mohan, 11 M. I. A. 393, 396.
(*q*) Girdhari Lal *v.* the Government of Bengal.
(*r*) Omrit Koomari Devi *v.* Lakhmi Naraiu Chakorbatty 10 S. W. R. (F. B), 76.
(*s*) Koser Golab *v.* Rai Narain, 14 M. I. A., 176.
(*t*) Veneyak *v.* Luxoomace Baee, 3 S. W. R. (P. C.), 41.

Full Bench of the Bengal High Court has held that the author of the *Mitakshara* uses the word *sapinda* in the sense of connection by particles of one body, and in order to see whether person is a *sapinda* of the other, it is necessary to see whether they are related as *sapinda* to each other, either through themselves or through their mothers and brothers. A sister's daughter's son was, therefore, held to be an heir according to the *Mitakshara*.(u)

The Madras High Court have recognized the claim of a son's daughter to inherit as a *bandhu* under the *Mitakshara* law.(v) The High Court of North-Western Provinces, on a review of all the authorities, have held in a recent decision that in the absence of nearer relatives a man may be heir to his mother's brother as regards property which is governed by the *Mitakshara* law of inheritance.(w)

Precedence amongst Bandhus.

The order of succession among *bandhus* under *Mitakshara* law is as below. First a man's own cognate kindred (*atma bandhu*) on failure of them, the father's cognate kindred (*pitru bandhu*), or if there be none, the mother's cognate kindred (*matru bandhu*.(x). The Madras High Court in a learned judgment by Mattusami Aiyar stated the following conclusions,—(1) that those who are *bhinna-gotra sapindas*, or related through females born, or belonging to the family of the prœpositus are *bandhus*; (2) that, as stated in the text of *Uridha Satatapa* or *Bandhyana*, they are of three classes, *viz.*; *Atma-bandhus*, *pitru bandhus* and *matru bandhus*, and succeed in the order in which they are named; (3) that the examples given therein are intended to show the mode in which nearness of affinity is to be ascertained, and (4) that, as between *bandhus* of the same class, the spiritual benefit they confer on the prœpositus is, as stated by Vira Mitrodaya a ground of preference.(y)

(u) Umaid Bahadur *v.* Udai Chand, I. L. R. 6 Cal (F. B.) p 119

(v) Nalouna *v.* Pouna. I. L. R. XIV M 149. see also I. L. R. XIV M. 10. See also pages 111. 12 of this book.

(w) Raghu Nath Kunri *v.* Mannan Misr, I. L. R. 2 A. 191, 1897.

(x) Mitakshara II, 6.

(y) Muttu Sami *v.* Muttu Kumar Sami, 16 Mad. 23. p 30. See as to priorities between maternal grand father and paternal aunt or maternal uncle. Chinna-Minal *v.* Venkat Chella, 15 Mad. 421, between son of sister's son and son of maternal uncle, Balusami *v.* Narayan Ram, 20 Mad., also Mayne on H. L. §. 579.

Order of preceden in Bengal.

The radical difference between the system of *Dayabhaga* and the *Mitakshara* is that the former allows the *bandhus*, that is, the *bhinna-gotra sapindas*, to come in along with, instead of after, the *gotraga sapindas*, the principle of religious efficacy being the sole test in deciding between rival claimants. (*z*)

Admissions of females.

Bombay law.—The distinctive feature of the law which prevails in Western India is the laxity with which it admits females to the succession. The doctrine of Bandhyana, which asserts the general incapacity of women for inheritance, and its corrollary that women can only inherit under a special text, appears never to have been accepted by the Western lawyers. They take the word *sapinda* in the widest sense as imparting mere affinity and without the limitation of the *Mitakshara*, that female *sapindas* can only inherit when they are also *gotrajas*, that is, persons who continue in the family to which they claim as heirs. (*a*)

Strangers.

When there are no relations of the deceased, the preceptor, or on failure of heir, the pupil, the fellow-student or a learned and venerable priest, should take the property of a Brahman, or, in default of such a one, any Brahman. Finally, in default of all these, the king takes by escheat, except the property of a Brahman, which it is said can never fall to the Crown. (*b*) The claims of a preceptor or pupil to the property of a person dying without heirs have not been found in any reported case, and the doctrine that the king does not take by escheat the estate of a Brahman was overthrown in the case of the Collector of Masulipatam *v* Cavaly Vencata Narain. But an estate taken by escheat is subject to the trust and charges, if any, previously existing (*c*) where the Crown takes by escheat it must make out affirmatively that there are no heirs. (*d*)

Property of an ascetic.

When a hermit has any property, which is not of secular origin, he generally holds it as the head of some *Mutt*, or religious endowment and succession to such property is regulated by the special custom of the

(*z*) Mayne on H. L., §. 580.

(*a*) W. and B., 125 132, Mayne.

(*b*) Mitakshara II 7 3, 5 and 6, Mayne H L. § 588.

(*c*) 8 M. I. A. p 500 S. C. 2. Suth. (P C.) 59.

(*d*) Girdhari *v.* Government of Bengal, 12 M. I. A. 448, S. C. 10 S. W. R. (P, C. 32.)

institution.(*e*) No one can come under the above heads for the purpose of introducing a new rule of inheritance unless retired from all earthly interest, and in fact become dead to the world. In such a case all property then vested in him passes to his legal heirs, who succeed to it at once. If this retirement is of a less complete character, the mere fact that he has assumed a religious title and has even entered into a monastry will not divest him of his property, or prevent his secular heirs from succeeding to any secular property which may have remained in his possession.(*f*) The true issue in such cases is did the man on becoming a faqir also intend to renounce the world, the burden of proof that he did not, being upon him.(*g*)

QUESTIONS ON CHAPTER XVII.

Inheritance.

1. Give the different classes of heirs under Hindu Law.

2. What determines priority of different classes of heirs according to Benares Law?

3. What is the rule as to succession to the property of a man who is divided from his sons and has sons born after division?

4. What scope has the rule of primogeniture in Hindu Law?

5. What is the law as to the succession of illegitimate sons?

6. How do widows succeed when there are more than one?

7. What effect has want of chastity on the right of succession of a widow?

8. How does the second marriage of a widow effect her right of succession?

How does it effect her right of guardianship of her children from her first husband?

9. What is the daughter's position in the scale of heirs?

(*e*) See para. 4. page 82 of this book.
(*f*) Mayne on H. L. § 59.
(*g*) P. R. 7, 1892; (case of an Udasi faqir).

10. What is the rule of succession when there are several daughters?

11. What is the position of daughter's son in the scale of heirs?

12. When there are daughter's son by different daughters how do they succeed?

13. What is the status of daughter's son as heir? Does he possess any vested interest in the estate?

14. What rights of succession does a daughter's daughter possess?

15. What are the rights of succession of parents?

16. What effect has the unchastity of a mother on her right of succession?

17. What are the rights of succession of brothers of whole and half-blood? and of undivided and divided brothers?

18. What are the rights of nephews to succeed?

When do they succeed *per stirpes* and when *per capita*?

19. Does a nephew possess any vested interest in the estate?

20. What are the rights of grand-nephews as heirs?

21. What are the rights of grand-father and great grandfather's line as heirs?

22. What play do whole and half-blood have in such cases?

23. What are the rights of *sakulyas* and *samavodkas* as heirs?

24. Who are *bandhus* and what are their rights as heirs?

25. What are the rights of a sister's son and of a maternal uncle?

26. What is the order of precedence among *bandhus*?

27. What special privilege do female heirs possess in the Bombay Presidency?

28. What are the rights of the king as heir?

29. What effect does the fact of a man's becoming a *fakir* have on his rights of succession in his family?

CHAPTER XVIII.

EXCLUSION FROM INHERITANCE.

Persons excluded.

Eunuchs and outcastes, persons born blind or deaf, mad men, idiots, the dumb, and such as have lost the use of a limb, are excluded from a share of the heritage. —Manu, IX, 201.

To this Yajna Valkya adds: "A person afflicted with an incurable disease and others must not also claim the heritage".—Yajna Valkya, II, 141.

Under the words 'and others' are comprehended one who has entered into an order of devotion; an enemy to his father; one who is guilty of a crime in the 3rd degree; and a person deaf, dumb or wanting any organ. —Mitakshara, II, 103.

In the original Sanskrit the word 'Nirindrya' is used by Manu, which is paraphrased by the expression "those who are devoid of a sense or organ," and who have not been already expressly mentioned in the first part of the verse. Those then, who are deprived from their birth of any organ or sense, are incapable of taking the heritage. It would follow that, if a person be totally deficient in the sense of touch, taste or smell, from his birth, the heritable right does not accrue to him. Supervening deficiency in a limb, organ or sense, does not work disinherision; but congenital defects, if incurable, are grounds of disqualification.

The ground of exclusion is, that these persons are incompetent to perform the religious rites which conduce to the spiritual welfare of the deceased (*a*).

Incurable disease

Where it is contended that a person is incapable of inheriting by reason of an incurable disease, the strictest proof of the incurability of the disease will be required (*b*).

(*a*) Sarvadhikari's Tagore Lectures, 1880, pp. 956—60. Muraji Gokal Das *v.* Parbatibai, I. L. R., 1 B., 177, 85—86.

(*b*) 2 W. R., 125.

Leprosy.

Leprosy to be a ground of disqualification must be of the sanious or ulcerous type (*c*).

Disqualified females excluded.

The grounds of exclusion apply both to male and female heirs. The Mitakshara says: "The masculine gender is not here used restrictively, in speaking of an outcaste and the rest. It must be, therefore, understood that the wife, the daughter, the mother, or any other female being disqualified for any of the defects specified, is likewise excluded from participation" (*d*).

Legitimate issue of disqualified persons, if, free from disqualifications, inherit.

The legitimate issue, however, of the disqualified persons are not excluded, but do inherit according to the pretensions of their fathers, provided they be faultless or free from defects which should debar their participation.

But not adopted sons.

Except to property already vested in adoptive parent.

The legitimate issue of the body alone are entitled to this heritable right. The adopted sons of disqualified persons cannot claim such a right. They are only entitled to maintenance. There seems, however, to be no reason why the adopted son of a disqualified heir should not succeed to property which had already vested in his father, or which was acquired by him. Similarly would be the case of his widow (*e*).

After-born son.

Under Hindu Law an estate can never remain in abeyance. If it has once devolved upon a full owner, on the latter's death his heirs succeed, and not the after-born heirs of the disqualified person, who did not exist when the disqualified person was excluded. The son of a disqualified person, born after the death of his grandfather, cannot succeed to the grandfather's estate along with his own paternal uncle. But this rule does not apply to a child in the womb when the succession opens, and who, when born, is free from disqualifying defects (*f*).

Removal of disqualifying defects.

Although a disqualified person becomes qualified to succeed on the ceasing of his disability, he cannot dis-

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(*c*) Janardhan Pandurang *v.* Gopal Basudev Pandurang, 5 Bom H. C., 145; Anantu *v.* Ramabai, I. L. R., 1 Bom., 554.

(*d*) Mitakshara, II, X. 8.

(*e*) Dayabhag, V, 19. Mitakshara, II, X, 10. Mitakshara, II, X, II, and T. L. L. for 1880, by Sarbadhikari, p. 967. Mayne on H. L., 6th Ed., Section 598, p 787.

(*f*) Sarbadhikari on H. L., p. 967; Kali Das *v.* Krishan, 2 B. L. R., 103.

possess an heir who has succeeded to it in consequence of the former's disqualification at the time of the opening of the succession (*g*).

Subsequent disability.

Property which has once vested in a person, either by inheritance or by partition, cannot be divested by a subsequently arising disability (*h*).

Entrance into a religious Order.

One who has entered into an order of devotion is also excluded from inheritance, but it must be shown that he has absolutely abandoned all his secular property, and has completely and finally withdrawn himself from earthly affairs. A Byragee merely in name is not excluded from inheritance. According to Madras High Court a Sudra being incapable of becoming a Yati or Sanyasi does not come under this disqualification, unless by usage (*i*).

Law or usage which inflicts forfeiture of, or effects rights on change of religion or loss of caste to cease to be enforced.

The defect of the loss of caste is cured by Act XXI of 1850, Section 1 of which is as follows:—So much of any law or usage now in force within the territories subject to the government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts, established by Royal Charter within the said territories.*

Forfeiture by crime.

According to the principles of public policy, a person who commits or abets the committal of murder, any person claiming under him or her, cannot be allowed to benefit by his or her criminal act. The

(*g*) Dev Kishen *v.* Bud Prakash, 5 All., 509 (F. B.)

(*h*) Do. and Abhilakh Bhagat *v.* Bhelchi, 22 Cal, 864.

(*i*) Mayne's H. L., 792; P. R., No. 1 of 1868; P. R., No. 15 of 1874; P. R., No. 7 of 1892; I. L R., 22 Mad., 302.

Exceptions - Byragees (No. 26 P. R., 1880). Certain Udasi sects in Jullundur District—No. 29 P. R., 1881, and Dadupanthi Fakirs in the Ferozepur District (No. 1538 of 1881). Gharbari Gosains of Kangra Valley marry and are succeeded by their widows—No. 125 P. R., 1881. Rattigan's Digest of Civil Law, 5th Ed., p. 30. Tiluk Chundur *v.* Samacharn Prakash, 11 W. R., 209 (Case of a Byragee). P. R., 93 of 1898 (Case of Gosains).

**Note.*—Act XXI of 1850 has been declared to be in force in the whole of British India, except the Scheduled Districts, by the Laws Local Extent Act, XV of 1874, Section 3.

murderer or the abettor and the persons claiming under him would be disqualified from inheriting the property of the deceased (*j*).

QUESTIONS.

1. What persons are excluded from a share of heritage?
2. What should be the nature of disqualification which would operate as a ground for disinherision?
3. What sort of proof would justify exclusion of a man from inheritance on the ground of an incurable disease?
4. Is leprosy a disqualifying ground; if so, under what circumstances?
5. Do the disqualifications apply to female heirs also?
6. Are sons of disqualified heirs entitled to succeed; if so, under what circumstances?
7. What is the status of adopted sons of disqualified heirs?
8. What are the rights of a son of a disqualified person, born after the death of his grandfather? Would the fact that the child was in the womb, make any difference in this respect?
9. What is the effect of a removal of disqualifying ground on a man's status?
10. What is the effect of a person's entrance into a religious order? What is the test in such cases?
11. What is the effect of Act XXI of 1850, on a person's loss of caste.
12. What effect has the crime of murder or abetment thereof on the heritable right of the criminal to the estate of the deceased?

(*j*) Mussammat Shah Khanum *v.* Kalaudhar Khan, P. R., No. 74 of of 1900, approving of Clever *v.* Mutual Reserve Fund Life Association (1892) 1 Queen's Bench, p. 147.

CHAPTER XIX.

Stridhan or Woman's Estate—The literal meaning of Stridhan is woman's property.

Definition.

" Whatever was given before the nuptial fire, whatever was given at the bridal procession, what was given in token of love, and what was received from a mother, a brother, or a father, are considered as the six-fold separate property of a married woman."—Manu.

According to the Benares School of Hindu Law the term includes property of every description belonging to a woman, and would include gifts to a wife at the time of her nuptials, and those posterior to the marriage from the family of her husband, as well as the gifts made to the wife by the husband himself. Ornaments " worn constantly " by women during their husbands' lives are considered their peculiar property; for from the constant wearing presumption is drawn that they were intended to be treated as the wife's Stridhan. But where ornaments are merely given to a wife to be worn on festive occasions, it is held to be a conditional gift which establishes no right of property (*a*).

Gift by husband to wife.

A gift by the husband to his wife of ancestral immovable property held in specific shares, and acquired lands and outstandings of debts which were the exclusive property of the donor, was one which, in the absence of a special custom, the donor being sonless, had, by Hindu Law, the power to make, and by virtue of which the donee became the absolute proprietress of the entire estate belonging to her husband.

According to the Hindu Law of the Mitakshara School such a donation is regarded as the wife's Stridhan, and although in the absence of an express power of alienation being conferred on the wife, she has

(*a*) Musammat Rukman *v.* Ganga Ram, P. R., No. 81 of 1880.

not a free power of disposition over the immovable portion of the property, the right of succession after her death passes to her heirs and not to the reversionary heirs of the husband (*b*).

Gift by mother to daughter.

A gift by a Hindu widow of land inherited from her husband to her married daughter forms the daughter's Stridhan, and on the latter's death the property passes to her husband in preference to an heir of the daughter's father (*c*).

Gift by father to daughter.

A gift by the father of a house to his daughter in token of love is her Stridhan, and on her death the house passes to her daughter, and her father's heirs have no right to it (*d*).

Burden of proof.

As a consequence of the doctrine that only some descriptions of property belonging to a woman constitute her Stridhan, it has been held that the burden of proving that any property belonging to a woman is her peculium lies on the party making such special allegation (*e*).

Woman's power of control over her Stridhan.

According to Hindu Law a woman's state is of perpetual tutelage, as will appear from the following texts :—

"In childhood must a female be dependent on her father, in youth, on her husband, her lord being dead, on her sons; if she has no sons, on the kinsmen of her husband; if he left no kinsmen, on those of her father; if she has no paternal kinsmen, on the sovereign, a woman must never seek independence" (*f*).

"Three persons,—a wife, a son, and a slave are declared by law to have in general no wealth exclusively their own; the wealth which they may earn, is regularly acquired for the man to whom they belong." (*g*).

These texts show the primitive state of law. Gradually the woman's right to her peculium was de-

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(*b*) Joti Ram *v.* Mussammut Suraste, P. R., No. 13 of 1883.

(*c*) Prem Singh *v.* Bodh Singh, P. R., No. 24 of 1876.

(*d*) Shib Dayal *v.* Mussammat Tabi, P. R., No. 88 of 1879; 56 of 1870, approved.

(*e*) Shreematty Chundermonee Dassee *v.* Joykissen Sircar, 1 W. R., 107.

(*f*) Manu, V, 148.

(*g*) Manu, VIII, 416.

veloped in modern law, and the privilege was extended by slow degrees even to males, and they are still hampered by many trammels in the matter of alienation, if the property be joint ancestral and immovable. Over some sort of property the woman has free power of alienation, and over the other her power is restricted by the action of her husband or his heirs.

Doctor Guru Das Bannerji gives the following deduction from the texts of Hindu Law on the subject:—

'So that a woman has independent and absolute ownership over her Saudayika Stridhan (gifts from affectionate relations) with the exception of gifts from her husband; and over these last, if not consisting of immovable property, her power of disposal becomes absolute after his death. This is the law according to all the schools (*h*).

A husband is not liable to make good the property of his wife taken by him in a famine, or for the performance of a duty, or during illness or while under restraint (*i*). But the right is personal to the husband and does not avail for his creditors (*j*).

Widowhood.

Property earned by the wife by mechanical arts or received as a gift from strangers, is subject to the husband's dominion (*k*).

Acquired property of females.

But property acquired by her during widowhood, by her skill and labor, or by gift from strangers, would become her Stridhan according to all the schools, as the fetters on her power of disposition drop by the husband's death (*l*). A pension was given to a widow by Government after the death of her husband. Out of the proceeds

(*h*) Tagore Lectures. 1878, p. 323.

(*i*) Yaguavalka, II, 147.

(*j*) 1 Strange 27, 28; 2 Strange 23, 24; Tag. Lect., 1878, p. 330.

(*k*) Colebrooke's Dig., Bk. V. 470; Dayabhag, IV, Sec. 1, 19.

(*l*) 1 C. L. R., 325, 326; also I. L. R., 1 Mad., 281.

of this pension she took a house in mortgage and made a will of this mortgage to her grandsons. *Held*, that the will was valid according to Hindu Law, and could not be impeached by the plaintiff who claimed to be the adopted son of the widow (*m*).

Property acquired on partition.

Property acquired by a woman on partition remains subject to the same restrictions to which the property inherited by her is subject (*n*).

Stridhan promised by the husband.

What has been promised to a woman by her husband as her exclusive property, must be delivered by her sons, provided she remains with the family of her husband, but not if she live in the family of her father (*o*).

Unchastity.

The Allahabad High Court has held that unchastity in a woman does not incapacitate her from inheriting Stridhan. The Calcutta High Court has, however, held that want of chastity causes a woman to become degraded and outcaste, and, as a general rule, the tie of kindred between a woman's natural family and herself ceases when she becomes degraded and an outcaste. From this it would appear that if this principal is sound, the converse of the proposition ought equally to apply, if a degraded female was claiming as heir to one who was undegraded (*p*).

Order of succession to Stridhan of an unmarried daughter.

Order of succession to the Stridhan of an unmarried daughter is as below :—

The whole brother.

Mother.

Father.

Failing these, her parent's relations, as they happen to be, succeed, according to the order of succession, to a childless woman's property (*q*).

(*m*) Muddi Mull *v.* Shahzada Karim Singh, P. R., No. 91 of 1876.

(*n*) Considerations on Hindu Law, 48; T. L. L. for 1878, p. 342.

(*o*) Colebrook's Digest, Bk V., 483; T. L. L. 1878, p. 342.

(*p*) See Ganga *v.* Ghasita, 1 All., 40; Goods of Kaminey Money Bewah, 21 C., 697. Mayne on H. L., 6th Ed., 878.

(*q*) Shama Charan Sircar's Vyavastha Darpana, p. 832 also.

ORDER OF SUCCESSION TO THE STRIDHAN OF A MARRIED WOMAN HAVING CHILDREN.

To her property received at the time of her nuptials:—

1. The unmarried daughter not betrothed.
2. The betrothed daughter.
3. { The daughter who has a son. The daughter likely to have a son.
4. { The barren daughter. The (sonless) widowed one.
5. Son.
6. Daughter's son.
7. Son's son.
8. Son's grandson in the male line.
9. The son of a rival wife.
10. Her son's son.
11. Her son's grandson in the male line.

To that received at any time other than that of her nuptials:—

1. { Son. Unmarried daughter.
2. { The daughter having a son. The daughter likely to have a son.
3. Son's son.
4. Daughter's son.
5. Son's grandson in the male line.
6. The son of a rival wife.
7. Her son's son.
8. Her son's grandson in the male line.
9. { The barren daughter. The (sonless) widowed daughter.

To that given by her father:—

1. The unmarried daughter.
2. Son.
3. { The daughter having a son. The daughter likely to have a son.
4. Daughter's son.
5. Son's son.
6. Son's grandson in the male line.
7. The son of a rival wife.
8. Her son's son.
9. Her son's grandson in the mile line.
10. { The barren daughter. The sonless widowed daughter.

ORDER OF SUCCESSION TO A CHILDLESS MARRIED WOMAN'S STRIDHAN.

Given by her parents before marriage, her fee or gratuity, or bestowed after marriage:—

1. The whole brother.
2. The mother.
3. The father.
4. The husband.

Other than that given by her parents, before marriage, her fee or gratuity, or bestowed after marriage.

If married according to the Brahma, Daiwa, Arsha, Prajapatya, or Gandharva form:—

1. The husband.
2. The brother.
3. The mother.
4. The father.

If married according to the Asura, Bakshasha, or Paishacha form:—

1. The mother.
2. The father.
3. The brother.
4. The husband.

SUCCESSION OF HEIRS AFTER THOSE AFORESAID TO ANY DESCRIPTION OF PROPERTY OF A WOMAN MARRIED ACCORDING TO ANY OF THE EIGHT FORMS.

5. Husband's younger brother.
6. The sons of the husband's younger and elder brother.
7. Her sister's son.
8. Her husband's sister's son.
9. Her own brother's son.
10. Her son-in-law.
11. The *Sapindas*.
12. The *Sakulyas*.
13. *Samanodakas*.
14. *Samana-gotras*.
15. *Samana-pravaras*.

QUESTIONS.

1. What is Stridhan ?
2. Give different instances of it.
3. On whom does lie the burden of proving any particular property to be Stridhan ?
4. What is the nature of a woman's estate according to Hindu Law ?
5. Over what sort of property has a Hindu woman full power of disposition, and over what property are her hands fettered ?
6. What are the powers of a widow over property acquired by her after her husband's death ?
7. What are the incidents of property acquired by a woman by partition as regards her power of disposition ?
8. What is the order of succession as to the Stridhan of an unmarried daughter ?
9. Give brief outlines of the order of succession to Stridhan of a married woman : (*a*) when see leaves children ; (*b*) when she leaves no children.

INDEX

A

Page.

C

D.

Page.

F

G

H